REPORT

ON

POLITICAL ACTIVITY, PUBLIC COMMENT AND DISCLOSURE BY CROWN EMPLOYEES

ONTARIO LAW REFORM COMMISSION

Ontario

Ministry of the
Attorney
General

1986

The Ontario Law Reform Commission was established in 1964 by the *Ontario Law Reform Commission Act* for the purpose of reforming the law, legal procedures, and legal institutions. The Commissioners are:

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*Mrs. Margaret Ross attended the meetings of the Commission at which this Reference was discussed and the recommendations considered. However, since the law firm in which she is a partner represented the Ontario Public Service Employees Union during our Public Hearings and in several matters now before the courts, Mrs. Ross did not vote on any of the recommendations and accordingly did not sign the Report.

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Ontario
Law Reform
Commission

The Honourable Ian G. Scott, QC
Attorney General for Ontario

Dear Mr. Attorney:

We have the honour to submit herewith our *Report on Political Activity, Public Comment and Disclosure by Crown Employees.*

CHAPTER 1

INTRODUCTION

1. TERMS OF REFERENCE

On December 16, 1985, the Ontario Law Reform Commission received from the Attorney General of Ontario, the Honourable Ian G. Scott, a Letter of Reference, which reads in part as follows:

> As you know, the government has been considering directing a reference to the Ontario Law Reform Commission to inquire into and report on the law relating to political activity by Crown employees. In accordance with clause 2(1)(d) of the Ontario Law Reform Commission Act, I am now pleased to refer to the Commission for its consideration and report, to be completed by next July 1, the following issues in respect of the ability of Crown employees to speak out on public issues or take part in political activity:
>
> 1. What restrictions on activities of Crown employees are required to ensure their independence and impartiality and to satisfy the public of their independence and impartiality.
>
> 2. Whether and to what extent the existing law and practices governing Crown employees restrict their activities beyond the extent necessary to ensure the existence and appearance of independence and impartiality.
>
> 3. Whether and to what extent changes to existing law and practices governing activities by Crown employees are necessary or desirable having regard to the Canadian Charter of Rights and Freedoms and the laws and practices of other comparable jurisdictions.
>
> 4. Whether and to what extent changes should be made in the oath of secrecy or the law relating to that oath in conjunction with any changes recommended.
>
> 5. Whether and to what extent the common law in relation to an employee's duty of loyalty and confidentiality bears on the above issues.
>
> In considering these issues, I would ask that you bear in mind that different considerations may apply to different groups of Crown employees, such as civil servants and public servants, and to different classifications and job descriptions.

As the Attorney General suggests in his letter, the subject matter of this Reference is not only timely, but is caught up in the flow of public events, both in this Province and elsewhere in Canada. As he observes, only a few days prior to the Letter of Reference, the Supreme Court of Canada had rendered an important judgment relating to the rights of public servants to engage in public criticism of government policy.[1] During the course of our deliberations, the Supreme Court also heard argument in an appeal challenging the constitutionality of the very provisions we have been asked to study,[2] and a trial began in the Federal Court challenging very similar provisions in the federal public service legislation.[3] In addition, a public inquiry in this Province heard evidence relating to the handling by the Liquor Control Board of Ontario of an important public health issue, and the effect of the oath of loyalty and secrecy on the actions of the Crown employees involved in the events surrounding that issue.[4]

It is clear to us that this Reference involves vital issues of public policy central to the organization of government and public administration, and to the individual rights and freedoms of a large and growing part of the work force. In the social and economic fabric of Canada and Ontario, the effectiveness of the public service and of other government employees is essential to the political and constitutional health of our country and Province.

Indeed, the essence of this Reference is to identify the essential elements of the public interest in effective public administration on the one hand, and the individual freedoms of Crown employees on the other, and to strike a balance between those competing interests that, to the greatest extent possible, enhances rather than diminishes the contributions, individually and collectively, of those who serve the people of Ontario. This complex and delicate task must be performed, moreover, within the exacting standards of constitutional guarantees set out in the *Canadian Charter of Rights and Freedoms*,[5] a document still largely bereft of jurisprudential elaboration in this area.

While the Reference itself is reasonably circumscribed, it must be considered in the context of a broad range of inter-related issues of public administration. The organization of the public sector, collective bargaining, freedom of information and personal privacy, and many other important aspects of public policy touch on the matters that we have been asked to study. For the most part, we have thought it appropriate to take the rest of the web of law and practice relating to public administration as we find it, and we have thus tailored our recommendations to the *status quo* in relation to the issues that surround our terms of reference.

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[1] *Re Fraser and Public Service Staff Relations Board* (1985), 23 D.L.R. (4th) 122, aff'ing [1983] 1 F.C. 372, (1982), 142 D.L.R. (3d) 708 (C.A.), aff'ing (1983), 5 L.A.C. (3d) 193 (P.S.S.R.B., Kates).

[2] *Re Ontario Public Service Employees Union and Attorney-General for Ontario* (1979), 24 O.R. (2d) 324, 98 D.L.R. (3d) 168 (H.C.J.), aff'd (1980), 31 O.R. (2d) 321, 118 D.L.R. (3d) 661 (C.A.), leave granted to appeal to the Supreme Court of Canada. This case is discussed *infra*, ch. 3, sec. 4(a).

[3] *Osborne v. The Queen*, Court File T-1226-84, heard jointly with two other actions; see discussion *infra*, ch. 3, sec. 4(a).

[4] Royal Commission of Inquiry into the Testing and Marketing of Liquor in Ontario.

[5] Being Part I of the *Constitution Act, 1982*, which is Schedule B of the *Canada Act 1982*, c. 11 (U.K.), as am. by the Constitution Amendment Proclamation, 1983, SI/84-102, effective June 21, 1984.

In one respect, however, we have thought it important to assume a change in the *status quo*. At the time of our study, freedom of information legislation was before the Legislature,[6] and its ultimate passage was a matter of formal government policy. Because of the considerable impact that such legislation would have upon the day to day conduct of Crown employees in relation to confidential information received in the course of their employment, we have taken this imminent change in the legislative context into account in preparing our recommendations on confidentiality.

2. CONDUCT OF THE REFERENCE AND ORGANIZATION OF THE REPORT

Upon receiving the Letter of Reference, the Commission retained Kenneth P. Swan, Esq., of the Ontario Bar, as Project Consultant. In addition, Kenneth Kernaghan, Professor of Public Administration and Politics, Brock University, was retained to advise and assist us with research relating to the doctrine of political neutrality and its implications.

In light of the importance of the Reference, the Commission placed a Notice in newspapers throughout the Province, setting forth the terms of reference, inviting the submission of briefs, and offering to hold Public Hearings in the following municipalities: Hamilton, Kingston, Kitchener, London, Ottawa, Sault Ste. Marie, Sudbury, Toronto, Thunder Bay, and Windsor.

In response to this Notice, individuals and groups in Toronto, Ottawa, and North Bay indicated a desire to make oral submissions to the Commission. Accordingly, eight days of Public Hearings were held in these cities, during which the Commission heard representations from a broad range of persons, including interested individuals, representatives of the Civil Service Commission and four public service unions, Members of the Provincial Legislature and the Federal Parliament, a professor of political science, and individual public servants and former public servants who had run afoul of existing restrictions governing political activity and public comment by public employees. In addition to oral representations, the Commission received some twenty-three written submissions.

We are most grateful to all who participated in the Public Hearings and who made submissions to us.[7] The views expressed were considered carefully and proved most valuable to us in our deliberations.

Turning now to the organization of the Report, it should be noted, first, that the Letter of Reference directs the Commission to consider five enumerated issues. Although these issues were subjected to careful consideration and analysis, they are not discussed separately in this Report, but, rather, are dealt with interstitially throughout the body of the Report.

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[6] *Freedom of Information and Protection of Individual Privacy Act, 1986*, Bill 34, 1986 (33d Leg. 2d Sess.).

[7] A list of the persons and organizations who made presentations to the Commission is attached to this Report as Appendix 1.

Chapter 2 contains a description of the doctrine of political neutrality, which has the status of a constitutional convention in Ontario, and which underlies the current restrictions on political activity and public comment by public servants.

Chapter 3 deals in some detail with the present Ontario law, both common law and statutory, governing the right of public servants to engage in political activity and public comment concerning government policy, and their duties with respect to the confidentiality of government information. The chapter concludes with an analysis of the *Canadian Charter of Rights and Freedoms* and its potential impact upon the restrictions under the present law.

In order to place the current Ontario restrictions in some perspective, chapter 4 contains a comparative analysis of the law in a number of other jurisdictions as it relates to political activity and public comment by public servants and confidentiality of government information. Among other matters described are recent changes in the United Kingdom granting increased political rights to public servants, and American legislative attempts to protect employees who "blow the whistle" and reveal confidential information relating to government wrongdoing.

Chapter 5 examines the case for reform of the existing law and describes the approach we have adopted in formulating our recommendations. The Commission's conclusions and recommendations, including the alternatives considered and rejected by the Commission, are set out in detail in chapter 6.

The Commission wishes to express its appreciation and gratitude to its Project Consultant, Kenneth P. Swan, Esq. Without his knowledge and profound understanding of the issues, and his dedication and patience at all stages of the project, it would not have been possible to complete the Reference within the time prescribed. We also wish to thank Professor Kenneth Kernaghan for his assistance in providing a public administration perspective to our deliberations.

3. STRUCTURE OF CROWN EMPLOYMENT IN ONTARIO

Our terms of reference require us to deal with political activities by "Crown employees". Crown employment in Ontario is a complex structure of employment relationships, organizational patterns, and functional differences. The institutions that control and monitor this structure also vary in organizational form and jurisdictional reach. We propose, therefore, to set out in this introductory section a description of the structure that we have been required to study for the purposes of this Reference.

As we shall see, there are several aspects to the taxonomy of Crown employment in Ontario. For our purposes, the most important of these is the categorization of Crown employees according to the nature of their relationship of employment with the Crown; this is the system by which Crown employees are differentiated under the present law for the purposes of restrictions on political activity and criticism of government action.

In this system, the expression "Crown employee" is the broadest category, and is inclusive of the two narrower categories, "public servant" and "civil servant". Similarly, the "public servant" category is broader than, but includes, the "civil servant" category.

A Crown employee is defined by the *Public Service Act* as a person "employed in the service of the Crown or any agency of the Crown".[8] From this very broad definition are excluded employees of Ontario Hydro and the Ontario Northland Transportation Commission;[9] these exclusions have historical roots, apparently arising from the considerable autonomy enjoyed by these two essentially commercial Crown agencies prior to the reorganization of the statutory basis of Crown employment.[10]

Leaving aside for the moment those members of this broad category who are employed directly in the service of the Crown, there is a kaleidoscopic array of Crown agencies of various types, sizes and activity employing large numbers of individuals on a full time or part time basis. Even after a recent extensive review of Crown agency policy that resulted in a dramatic reduction in the number of agencies, a current directory of Crown agencies shows over 200 listings, of which some are in fact classes of agencies comprising a large number of members; an example is the entry, "Boards of Governors, Colleges of Applied Arts and Technology", which comprises 22 separate boards of individual colleges.[11] There are also *ad hoc* bodies appointed from time to time with life spans from a few days to years.

These agencies have their membership appointed, in whole or in part, by the Lieutenant Governor in Council, and enjoy varying degrees of independence from ministerial control. Some of them receive their administrative support from people directly employed by the Crown under the *Public Service Act;* some of them appoint their own employees. The employment relationships are therefore as diverse as are the agencies themselves.[12] Although the Crown employee category is, as we shall see, the least restricted of the categories in respect of political activity and public comment, the sheer breadth of this category encompasses a large number of employees across the public and quasi-public sector of Ontario.

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[8] R.S.O. 1980, c. 418, s. 1(e).

[9] *Ibid.*

[10] See *Ont. Leg. Ass. Deb.*, Feb. 14, 1963, at 716. Originally the Workmen's Compensation Board (now Workers' Compensation Board) was also excluded, but that was reversed by *The Public Service Amendment Act, 1972*, S.O. 1972, c. 96, s. 1.

[11] Management Policy Division, Management Board Secretariat, *Agencies of the Government of Ontario* (April, 1986).

[12] Agencies fit into three functional categories: advisory, operational and regulatory. Administratively, they fall into three "Schedules", comprehensively defined in the Manual of Administration, section 25.2. In general terms, Schedule I includes agencies, of all three functional kinds, that are funded in whole or in part out of the Consolidated Revenue Fund or levies imposed on the public; Schedule II includes operational agencies in commercial or industrial activity that are, or are intended to be, self-supporting;

Turning now to those directly employed by the Crown, rather than by a Crown agency, the vast majority of this very large group falls into one of the two more restricted definitions to which we have made reference above. Membership in either of these two groups requires employment directly by the Crown; the assignment of individuals between the two groups depends upon the nature of the appointment and the manner of creating that appointment. A public servant is defined as a person appointed to the service of the Crown "by the Lieutenant Governor in Council, by the Commission or by a minister".[13] A civil servant is a person appointed to the service of the Crown "by the Lieutenant Governor in Council on the certificate of the Commission or by the Commission".[14] "Public service" and "civil service" have a corresponding meaning.

The civil service, sometimes also called the classified service, is the traditional full-time career service that has, as we shall see,[15] attained a status that is quasi-constitutional in nature by virtue of attributes ascribed to it by the legal and public administration literature and tradition. Civil servants have considerable security of tenure, have traditionally been better protected by pension and welfare benefit plans, and are said to be employed under the terms of the "merit system", a concept that we shall describe in greater detail in chapter 2 of the Report. This is also the group, as we shall see, that is the most politically restricted of the three categories here discussed.

The public service includes the civil service, but also includes a number of employees in the so-called unclassified service who are appointed directly by Ministers for work of various kinds. This category is restricted by regulation to specific kinds of employees: in one group are those on a project of a non-recurring kind; those employed in a professional or other special capacity; those on a temporary work assignment under a temporary help programme; those employed for fourteen hours or less during a week, or fewer than nine full days in four consecutive weeks, or on an irregular or call-in basis; and those who are employed during school, college or university vacations on a co-operative

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Schedule III includes operational agencies which, although not self-supporting and reliant on public funding, are allowed to operate independently of government. Only the employees of Schedule I agencies are to be "appointed under the *Public Service Act*", but it would appear that the expression "Crown employees" in that statute is broad enough to cover the employees of all agencies. The entire structure of Crown agency has recently been reviewed, and was considerably altered effective May 6, 1986. This alteration has reduced significantly the number of Crown agencies as defined in the Manual of Administration.

[13] *Public Service Act*, *supra*, note 8, s. 1(g).

[14] *Ibid.*, s. 1(a).

[15] See discussion *infra*, ch. 2.

education training programme. Two separate groups comprise employees who work on a seasonal or recurring basis that does not require full-time, year round employment; the two groups are distinguished by the number of hours worked per week and the number of weeks of continuous employment.[16] Tenure and conditions of employment vary from group to group.

Direct Crown employment in Ontario involves a large number of people. As of March 31, 1986, there were 81,592 persons showing on monthly staff strength reports as being paid out of the Salary and Wages Standard Account. Of these, 66,971 were civil servants employed in the classified service; 13,357 were public servants employed in the unclassified service; and 1,264 were other Crown employees not fitting into the more restricted categories.[17] Even without reference to the broad sweep of Crown agency employment, therefore, it will be clear that the political restrictions that we are discussing in this Reference affect large numbers of persons indeed.

A second major categorization of Crown employees is related to the way in which they may influence terms and conditions of their employment; the structure of collective bargaining for employees, and their exclusion from such a structure, is another complex aspect of the regulation of Crown employment. We think it important to set out a concise description of this structure at this point, because of the importance of the collective bargaining system for the administration of the employment relationship, and because of the impact it has upon the availability of adjudication mechanisms for the resolution of disputes that may arise concerning the application or administration of political restrictions, either under the present system or under any other system that may be implemented.

Most Crown employees who are entitled to be covered by collective bargaining have their employment relationship regulated under the *Crown Employees Collective Bargaining Act*,[18] which was enacted in 1972.[19] That legislation, which purports to apply to Crown employees as defined in the *Public Service Act*, subject to a number of specific exceptions, in fact has never been interpreted as having the same broad application to employees of Crown agencies as the definition of such agencies in the Manual of Administration might suggest. Rather, the legislation applies to the main body of directly employed Crown employees, and to a few specific agencies that have been constituted separate employers for the purposes of the Act. The Liquor Control Board and Liquor Licence Board of Ontario, the Workers' Compensation Board, the Niagara Parks Commission and the Ontario Housing Corporation have all been made separate employers by regulation.[20]

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[16] R.R.O. 1980, Reg. 881, s. 6, as en. by O.Reg. 24/86, s. 3(1).

[17] Data provided by the Civil Service Commission. The "other Crown employees" figure includes Crown employees who are neither civil servants nor public servants, but who are paid out of the Salary and Wages Standard Account. Not represented in the monthly staff strength report statistics are the many other Crown employees who are not paid out of the Salary and Wages Standard Account. The "other Crown employee" statistic therefore excludes fee for service individuals, as well as those paid by transfer payment. Thus, excluded are many of the employees of those agencies, boards and commissions that do not appoint their staff under the *Public Service Act*. Accordingly, the figures do not include community college teachers. Nor do they include, for example, employees of the Toronto Area Transit Operating Authority, the Social Assistance Review Board or the Workers' Compensation Board. Of course, by virtue of the definition of "Crown employee" in the *Public Service Act* (discussed *supra*, this ch., this sec.) the employees of Ontario Hydro and the Ontario Northland Transportation Commission are also excluded. Accordingly, total Crown employment for the Province could exceed substantially the figure of 81,592 appearing on the monthly staff strength report.

[18] R.S.O. 1980, c. 108.

[19] *The Crown Employees Collective Bargaining Act, 1972*, S.O. 1972, c. 67.

The Ontario Provincial Police Force and the Colleges of Applied Arts and Technology are expressly excluded from the Act.[21] A bargaining unit of the former organization is established under the *Public Service Act*, with a specific regime of collective bargaining provided.[22] Similarly, college employees are permitted to bargain in either an academic staff or a support staff bargaining unit with the Council of Regents of the college system under the *Colleges Collective Bargaining Act*,[23] which also provides a separate regime. For all other Crown agencies, as broadly defined in the Manual of Administration, collective bargaining may take place, and certainly does for a large number of these agencies, under the *Labour Relations Act*.[24]

Under the *Crown Employees Collective Bargaining Act*, the usual exclusions common to labour relations statutes are found. Persons employed in a managerial or confidential capacity; in a professional capacity; as a student on a co-operative education training programme; on a part-time basis involving less than one-third of the normal work schedule; or on a non-recurring or temporary basis may not be a part of the bargaining unit. There are certain other limited exceptions as well.[25] Even with these exclusions, the main bargaining unit of employees directly employed by the Crown comprises some 60,000 individuals, who are represented by the Ontario Public Service Employees Union. That union also represents some 375 employees of the Niagara Parks Commission under the same legislation, and some 14,000 employees of the Colleges of Applied Arts and Technology under the *Colleges Collective Bargaining Act*.[26]

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[20] R.R.O. 1980, Reg. 232, s. 1.

[21] *Crown Employees Collective Bargaining Act*, *supra*, note 18, s. 1(1)(f).

[22] *Supra*, note 8, ss. 27-28.

[23] R.S.O. 1980, c. 74.

[24] R.S.O. 1980, c. 228. The Act does not bind the Crown because the Act does not state expressly that the Crown is bound: see *Interpretation Act*, R.S.O. 1980, c. 219, s. 11. For the purpose of deciding whether a body is an agent or servant of the Crown, and thus excluded from the Act, reference has been made to the definition in s. 1 of the *Crown Agency Act*, R.S.O. 1980, c. 106: see *R. v. Ontario Labour Relations Board, ex parte Ontario Housing Corporation*, [1971] 2 O.R. 723, 19 D.L.R. (3d) 47 (H.C.J.).

[25] *Crown Employees Collective Bargaining Act*, *supra*, note 18, s. 1(1)(f).

[26] *Supra*, note 23. Data provided by the Ontario Public Service Employees Union.

While these bargaining relationships will have a considerable impact upon the terms and conditions of employment of the Crown employees subject to them, and while certain aspects of the relationships will touch on issues of political activity, it will be obvious that the collective bargaining legislation will not permit groups of employees to negotiate exemptions from the general political restrictions set out in the *Public Service Act*.[27]

All employees covered by a collective agreement negotiated under the *Crown Employees Collective Bargaining Act* are entitled to adjudication of disputes in respect of the interpretation, application, and administration or alleged contravention of that collective agreement before the Crown Employees Grievance Settlement Board established by the Act.[28] The Board is a tripartite body, composed of members representative of union and management interests, and a Chairman and Vice Chairmen appointed as neutral members. All appointments are made by the Lieutenant Governor in Council, although the Act establishes specific consultation provisions in respect of the appointment of union representatives on the Board and the appointment of the neutral members.

In addition to rights of grievance under a collective agreement, employees may also carry grievances relating to classification of their position or appraisal of their performance, or alleging discipline, dismissal or suspension without just cause. The Grievance Settlement Board has a substantial case load and, as we shall see, has dealt from time to time with cases involving discipline in relation to the political restrictions set out in the *Public Service Act*. The Board has a specific statutory authority to mitigate a disciplinary penalty where it finds grounds for discipline exist, but the particular penalty imposed is too harsh.[29]

For Crown employees not covered by the collective bargaining provisions of the *Crown Employees Collective Bargaining Act*, a parallel system of adjudication is provided under the regulations to the *Public Service Act*, which establish the Public Service Grievance Board,[30] a body that in fact existed to handle all adjudication prior to the establishment of the Grievance Settlement Board.

Employees who have been continuously employed for twelve months may lodge a grievance relating to dismissal; such a grievance may be processed to the Board for resolution, which is in the form of a report to the Lieutenant Governor in Council, who has final authority in respect of dismissals. This grievance procedure does not apply to uniformed members of the Ontario Provincial Police Force, who are covered by the provisions of the regulations to the *Police Act* in respect of disciplinary matters.[31] While the regulation does not give the Board an express authority to substitute a lesser penalty for a discharge where the Board finds that some disciplinary action is appropriate short of termination of employment, the Board has nevertheless acted as if it has authority to take such action, always subject to the overriding authority of the Lieutenant Governor in Council.

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[27] The *Crown Employees Collective Bargaining Act*, *supra*, note 18, contains a limitation on the subject matter of negotiations in s. 14, which prohibits bargaining for any provision that would require legislative amendment.

[28] *Supra*, note 18, s. 19(1).

[29] *Ibid.*, s. 19(3). See, also, s. 19(4) and (5), as am. by S.O. 1984, c. 55, s. 214.

[30] R.R.O. 1980, Reg. 881, s. 37.

Public servants who have been continuously employed under the jurisdiction of a deputy minister for six months, with certain exceptions, are also entitled to lodge grievances relating to working conditions or terms of employment. Once again, uniformed members of the Ontario Provincial Police Force are excepted, since they are covered by collective agreements negotiated under the *Public Service Act*. In addition, there are other broad exclusions from access to this grievance procedure by virtue of Schedule 1 to the regulation. Grievances relating to classification must be referred to a Classification Rating Committee for final resolution.

Other persons who may be affected by the *Public Service Act* restrictions on political activity have to find an adjudication system either within a collective agreement under the *Labour Relations Act*, or under special legislation such as the *Colleges Collective Bargaining Act*, or will have to resort to the courts for the resolution of any difficulties that may arise.[32] The number of persons covered by the political restrictions who may be without access to non-adjudicative resolution of differences arising from those restrictions cannot readily be calculated, given the complexity of the factors that determine such access.

The final categorization of Crown employees that is of relevance for our purposes is the classification system for jobs performed by Crown employees in the direct service of the Crown. Leaving aside the Ontario Provincial Police, there are five compensation plans or classification systems covering Crown employees, three of which are particularly important for our purposes. The other two are the senior executive compensation plan, which includes only deputy ministers and heads of agencies of equivalent rank, and the excluded category compensation plan, which includes a small number of employees, most of whom are in positions parallel to members of the bargaining unit, but are excluded from the bargaining unit for a number of reasons, mostly because of a confidential capacity in relation to labour relations.

The three major compensation plans are the executive compensation plan, which applies to the senior managers of the public service, the management compensation plan, which applies to managerial employees outside the bargaining unit, and the classification plan applicable to the bargaining unit itself. These plans represent variants of the traditional classification system, in accordance with which jobs are placed in job families based on functional considerations, and are then ranked into more specific classes, and levels within each class, according to the duties performed. Each job is reduced to a written description in standard form, and then compared against a standardized set of class and level descriptions. The bargaining unit compensation plan is essentially based on traditional classification techniques; the two senior plans and parts of the bargaining unit plan are based on the more sophisticated factor analysis method, where jobs are compared with benchmark positions on the basis of a number of defined factors, such as knowledge, judgment, responsibility and contacts.

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[31] R.R.O. 1980, Reg. 791, Part II, as am. by O.Reg. 74/84 and O.Reg. 702/85.

[32] Because of the common law doctrine that Crown employment is presumptively at the pleasure of the Crown, judicial remedies may be unavailable or limited in scope.

For the purposes of this Reference, it is not necessary to set out a detailed description of how these plans work. What is important is that the classification to which an individual Crown employee is assigned may say very little indeed about the actual job duties that the particular Crown employee will perform from day to day. The functional divisions within each plan will give a broad indication of the kinds of duties that the employee will perform; for example, the management compensation plan is divided into administrative, clerical, operational, professional and technical modules, and the bargaining unit plan is divided into a similar set of groupings called categories. The classification and level assigned will also give some indication of the particular kinds of duties assigned and the level at which they are carried out, but even that description will still not convey much detail about how the employee spends the working day. Some classifications can, in fact, contain employees who do very different jobs in different ministries; the only thing that the employees will have in common is that, for pay purposes, they have been ranked equally.

Against this structural background, therefore, and before we discuss the present Ontario law relating to restrictions on political activity, public comment, and the disclosure of government information to which Crown employees are subject, we turn to a consideration of the doctrine of political neutrality, which forms the rationale for the original imposition and current validity of the existing restrictions.

CHAPTER 2

THE DOCTRINE OF POLITICAL NEUTRALITY

The doctrine of political neutrality is a central feature of constitutional theory and practice in Canada's federal and provincial governments. In the words of the Ontario Court of Appeal, there is in Ontario "a public right that has been recognized for well over a century: the right to have government administered by an impartial civil service".[1] The current restrictions on the rights of Crown employees to engage in political activity and to comment publicly on government policy and action are intended to buttress this convention of political neutrality.

The components of the traditional doctrine of political neutrality are fairly clearly established in the literature. The tenets of the doctrine are as follows:[2]

1. Politics and policy are separated from administration. Thus, politicians make policy decisions; public servants execute these decisions.
2. Public servants are appointed and promoted on the basis of merit rather than on the basis of party affiliation.
3. Public servants do not engage in partisan political activities.
4. Public servants do not express publicly their personal views on government policies or administration.
5. Public servants provide forthright and objective advice to their political masters in private and in confidence. In return, political executives protect the anonymity of public servants by publicly accepting responsibility for departmental decisions.
6. Public servants execute policy decisions loyally and zealously irrespective of the philosophy and programmes of the party in power

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[1] *Re Ontario Public Service Employees Union and Attorney-General for Ontario* (1980), 31 O.R. (2d) 321 (C.A.), at 331. See, also, Hodgetts, *The Canadian Public Service: A Physiology of Government, 1867-1970* (1973), at 313-14.

[2] This model of political neutrality is drawn from Kernaghan, "Politics, Policy and Public Servants: Political Neutrality Revisited" (1976), 19 Canadian Public Administration 432, at 433.

> and regardless of their personal opinions. As a result, public servants enjoy security of tenure during good behaviour and satisfactory performance.

These requirements are thought to be interdependent in the sense that a change in one of them tends to affect the others.

The evolution of the doctrine of political neutrality in Canada has been influenced by experience in the United States and Great Britain.[3] It is difficult to specify for any of the three countries a particular date or event that marked the emergence of the doctrine. As early as 1801 in the United States, President Thomas Jefferson asserted that the best way to bring about an impartial government was to bar government employees from "the business of electioneering", which he considered to be "inconsistent with the spirit of the Constitution and the [employees'] duties to it".[4] There is evidence also that by 1830, although patronage was still a fact of British political life, "the more flagrant subordination of administrative efficiency to political considerations had disappeared...."[5] Moreover, in the 1840's, the practice of civil servants holding seats in the British Parliament "was slowly abandoned as ministerial responsibility began evolving and a new set of accompanying conventions took hold. The political activity of civil servants gradually became a prohibition" and "public comment by officials about government policy became anathema...."[6]

With respect to Canada, the conclusion has been drawn that "[c]learly there was a convention of political neutrality of Crown servants at the time of Confederation and the reasoning in support of such convention has been consistent throughout the subsequent years."[7]

The evolution of the doctrine of political neutrality in all three countries was tied to efforts to reduce or eliminate the practice of political patronage, that is, the awarding of public service posts to supporters of the governing party. Although patronage was practiced by British monarchs and British colonial governors as a means of ensuring loyal followers, its use became much more extensive with the rise of the modern party system during the 1800's. The struggle for power among political parties encouraged them to reward their supporters with government jobs; this resulted in the removal of large numbers of public servants with each change of government.[8] In the United States, the level of political patronage reached its height under the so-called "spoils system", which involved a very large turnover of public servants as the victorious political party awarded public service posts to its followers.[9]

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[3] See Hodgetts and Dwivedi, *Provincial Governments as Employers: A Survey of Public Personnel Administration in Canada's Provinces* (1974), at 15 *et seq.*

[4] Quoted in Peirce and Hagstrom, "Is it Time to Hatch Federal Employees from their Nonpartisan Shells?" (1977), 9 The National Journal 585, at 586.

[5] Finer, "Patronage and the Public Service" (1952), 30 Public Administration (London) 329, at 353. See also, generally, Clark, "Statesmen in Disguise: Reflections on the History of the Neutrality of the Civil Service" (1959), 2 The Historical Journal 19.

[6] Wilson, *Canadian Public Policy and Administration: Theory and Administration* (1981), at 241.

[7] *Re Ontario Public Service Employees Union and Attorney-General for Ontario*, *supra*, note 1, at 330.

Concern about the inefficiency of government administration caused by political patronage led to the adoption of measures to abolish the practice. Within the British public service, patronage was dramatically reduced.[10] Similarly, in the United States, agitation against the excesses of the spoils system led to the enactment of the Civil Service Act of 1883 (the Pendleton Act)[11] which, among other things, imposed restraints on the political activities of public servants.[12]

For more than four decades after Confederation, political patronage pervaded the federal and provincial spheres of Canadian government.[13] These governments had been influenced both by the patronage practices of the British colonial governors and by the spoils system in the United States.[14] A federal Civil Service Commission was established under *The Civil Service Amendment Act, 1908*,[15] and *The Civil Service Act, 1918*[16] emphasized the merit principle in staffing by requiring competitive examinations for entry and placing severe restrictions on the political partisanship of public servants.[17] These restrictions remained virtually unchanged until the enactment in 1967 of the *Public Service Employment Act*.[18]

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[8] See Hodgetts, *supra*, note 1, at 51-54.

[9] See, generally, Van Riper, *History of the United States Civil Service* (1958), ch. 3. See, also, Dawson, *The Civil Service of Canada* (1929), at 25-33.

[10] Inspired in part by the recommendations of the Northcote-Trevelyan Report (*Report on the Organization of the Permanent Civil Service*, P.P. 1854), the Orders-in-Council of 1855 (establishing a Civil Service Commission) and 1870 (which instituted a system of open competitive examinations for future appointments to the Civil Service) are credited with reducing the incidence of patronage appointments. See, generally, Cohen, *The Growth of the British Civil Service: 1780-1939* (1941), chs. 6-11, for a discussion of the gradual reform of the British Civil Service.

[11] Civil Service Act of 1883, ch. 27, 22 Stat. 403. See, further, *infra*, ch. 4, sec. 4(a)(i)b.

[12] See Van Riper, *supra*, note 9, at 74 *et seq.*

[13] See Dawson, *supra*, note 9, chs. 2-6, and Hodgetts, McCloskey, Whitaker, and Wilson, *The Biography of an Institution: The Civil Service Commission of Canada, 1908-1967* (1972), at 9-19.

[14] See Dawson, *supra*, note 9, at 25-34, for a discussion of the influence of the American spoils system on Canadian developments. See, also, Hodgetts *et al.*, *supra*, note 13, at 18, where the authors note that, although patronage was never as rampant in Canada as it was in the United States, Canadian preoccupation with the evils of patronage continued long after the American focus had shifted from patronage to the systemic inefficiencies of the civil service.

[15] S.C. 1908, c. 15.

[16] S.C. 1918, c. 12.

[17] See Dawson, *supra*, note 9, at 79-80.

The pattern of political patronage in provincial governments was similar to that of the federal government. By 1918, several provincial governments, including Ontario, had adopted laws that established central personnel agencies for the purpose of pursuing merit, in large part through the elimination of patronage. The decline of patronage in the provinces was, however, comparatively slow. The pace of reform varied from one province to another, and in some provinces patronage was a serious impediment to merit-based appointments as late as the early 1960's.[19]

The very nature of a constitutional convention is that its meaning and application evolve over time, and the doctrine of political neutrality is no exception to the general rule. While there is widespread agreement concerning the components of the *traditional* doctrine of political neutrality, there is also agreement that the practices and policies of contemporary governments in Canada do not follow strictly the traditional requirements of the doctrine. It is, therefore, important to assess the present meaning of each of the tenets of the traditional model of political neutrality.

The first tenet relates to the separation of policy development from policy administration: "politics and policy are separated from administration. Thus, politicians make policy decisions; public servants execute these decisions."

The scholarly literature records a long and continuing controversy over the extent to which it is possible — and desirable — to distinguish politics and policy from administration.[20] From the late 1800's to the late 1940's, most academic theorists and civil service reformers, especially in the United States but also in Canada, argued that politics and policy could and should be separated from administration. The objective of this separation was an efficient and nonpartisan public service where policy decisions were made by elected politicians rather than by appointed officials. The difficulty of trying to maintain this contrived distinction in the actual conduct of government business gradually became evident. Following the Second World War, academic writers began to draw attention to the reality of bureaucratic power in the political system, and specifically in the development and implementation of public policy.[21] To be fair to earlier writers, it is notable that the growth in the scale and complexity of government during and after the war years made a significant policy role for public servants both more necessary and more visible.[22]

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[18] S.C. 1967, c. 71.

[19] See, generally, Hodgetts and Dwivedi, *supra*, note 3, ch. 2.

[20] For an excellent discussion of the "policy/administration dichotomy", see Wilson, *supra*, note 6, ch. 4. See, also, Sayre, "Premises of Public Administration: Past and Emerging" (1958), 18 Public Administration Review 102.

[21] *Ibid.*

[22] See Wilson, *supra*, note 6, at 80-81.

It is now widely recognized that public servants, as a result of their responsibilities to provide policy advice to political superiors and to make discretionary decisions in the course of policy implementation, are major actors in the political system. In general, the more senior public servants are, the more influence they have on the content of policies and programmes; however, valuable contributions to policy development are also made at the middle levels of the administrative hierarchy. Moreover, the implementation of policies and programmes requires the exercise of discretion by public servants at even lower levels of the hierarchy. Thus, public servants are involved in "politics" in the broad sense of the word: the authoritative allocation of social values.[23] During the regular routine of carrying on government business, it may be difficult for politicians and public servants to separate politics in this sense from administration. Nevertheless, while public servants have little choice but to carry out their responsibilities to give advice and make decisions, they are not required to participate in partisan politics in order to carry out this function; and such participation remains a separate choice.

Despite these considerations, the notion that politics and policy can and should be separated from administration has endured. This can be largely explained by the practical appeal that this artificial separation has for both elected and appointed officials. It enables governments to claim that they have removed certain functions — for example regulation of rent levels, or the granting of liquor licences — from the sphere of "politics" by transferring these functions to semi-independent agencies, boards and commissions. In addition, the fiction that public servants simply execute decisions made by elected officials permits public servants to exercise power while retaining their anonymity and protection from public criticism.

Thus, while politicians formally make the major policy decisions, public servants influence these decisions and make decisions of their own under authority delegated to them by the legislature and the Cabinet. Political involvement in this broad sense can be distinguished from the narrower concept of partisan politics, which implies identification with a political party and which can more easily be separated from administration.

The second tenet of political neutrality has to do with the merit system: "public servants are appointed on the basis of merit rather than on the basis of party affiliation or contributions".

According to the merit principle of public personnel management, citizens should have a reasonable opportunity to be considered for appointment to the public service, and all appointments should be based on merit in the sense of fitness for the job. The merit system, which is the mechanism by which governments pursue the merit principle, has adapted over time to changing political, administrative and social circumstances.[24] The vast majority of public servants are appointed, and promoted, on the basis of competence and performance. However, the merit system allows for, or is unable to prevent, the appointment to the public service of some persons whose contributions to the governing party are a major factor in their selection.

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[23] This definition is widely accepted in the social sciences. According to Easton, for example, "[p]olitical life concerns all those varieties of activity that influence significantly the kind of authoritative policy adopted for a society and the way it is put into practice": Easton, *The Political System* (1974), at 128.

In contemporary Canadian governments, patronage or "political" appointments tend to be concentrated at the highest and lowest levels of the public service. Public and media concern focusses more on political appointment to senior posts than to lower-level positions in such departments as highways and public works. The great majority of the senior appointments are made to agencies, boards and commissions rather than to the operating departments of government. In a few jurisdictions, however, political appointments have been made to deputy ministerial posts in regular government departments.

The practice of making patronage appointments clearly encroaches on the political neutrality of the public service; appointees are known to be active political partisans, and there is a tendency to politicize the public service by encouraging public servants to engage in partisan politics as a route to advancement. Moreover, patronage appointees, whether at the highest or lowest levels of the government, are strongly motivated to demonstrate continuing loyalty to the party in power so as to keep their jobs. With a change of government, however, they are likely to lose their jobs altogether.

The third tenet is the prohibition against overt partisan involvement: "public servants do not engage in partisan political activities".

Until the 1960's most governments in Canada adhered to this tenet of the traditional doctrine of political neutrality. With the exception of the right to vote, the partisan political activities of public servants were severely restricted in both the federal and provincial spheres of government. The limitations imposed on political partisanship were designed to eliminate political patronage and promote administrative efficiency by staffing the service on the basis of merit. By the 1960's, the practice of political patronage seemed to have declined sufficiently for several governments to extend the permissible limits of political partisanship for public servants. As explained below in later chapters of the Report,[25] the extent to which public servants are now permitted to engage in political activities varies from one government to another, not only in Canada but in democratic states generally.

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[24] Concerns about the administrative and economic inefficiency of the civil service led to the adoption of the merit system as an attempt both to attract the "best brains" to the service and to promote members for demonstrated competence rather than party loyalty. The most significant contribution of the merit principle was the institution of open competitive entrance examinations. See Cohen, *supra*, note 10, at 102-03, and Van Riper, *supra*, note 9, at 110-12. For a definition of the merit principle as it has been implemented by the merit system in the Canadian context, see Dowdell, "Personnel Administration in the Federal Public Service", in Willms and Kernaghan (eds.), *Public Administration in Canada: Selected Readings* (1968) 360, at 367.

[25] See, *infra*, chs. 3 and 4, dealing, respectively, with the present Ontario law, and the law in other jurisdictions.

The range of activities encompassed by the term political partisanship includes voting, seeking election to public office, holding membership in a political party or organization, holding office in a political party or organization, attending political meetings, rallies or conventions, making a financial contribution to a political party or candidate, campaigning for a political party or candidate by soliciting financial or other contributions, canvassing door to door, making public speeches, distributing campaign literature, wearing political badges, displaying lawn signs, working in a partisan capacity at the polls or transporting voters to the polls, and working as an election officer at the polls.

These political activities can be divided into two broad categories of low-profile and high-profile political partisanship. The first category includes such activities as voting, being a member of a political party, and making a financial contribution to a political party; the second category includes such activities as seeking election to public office and campaigning for a political party or candidate. Most public servants are allowed to participate in low-profile activities because such participation does not require them to become visible to the public. There is some difference of opinion, however, as to which, if any, of the high-profile activities should be permitted; participation in these activities requires active political partisanship that can affect adversely the actual or perceived impartiality of the public servants involved and, indeed, of the public service in general. Most public servants may participate in the political activity with the highest visibility — standing as a candidate for public office — but they are usually required to take a leave of absence without pay to do so.

While governments can regulate both these categories of political partisanship, it is difficult or impossible to control certain types of what can be described as *covert* partisanship. Public servants have opportunities to engage in covert partisanship by allowing the performance of their official duties to be influenced by sympathy for the policies of a particular political party. These covert activities could include, for example, negative decisions against clients known to be affiliated with another political party, or the leaking of government documents to embarrass the governing party. There can also be hidden consequences for the careers of public servants who participate in political activity that is legally permissible but that is nonetheless frowned upon by political or administrative superiors.

The fourth tenet of the doctrine of political neutrality as traditionally understood is the rule against critical comment: "public servants do not express publicly their personal views on government policies or administration". If this tenet were rigidly interpreted in practice, freedom of expression by public servants would be confined within very narrow bounds indeed. Yet many governments in Canada provide little guidance concerning what kinds of public comment by public servants are permissible and what kinds are prohibited.

Restrictions on public comment, like those on political partisanship, are designed largely to ensure the political neutrality of the public service. However, unlike restrictions on political partisanship, restrictions on public comment tend to be based to a large extent on unwritten rules and understandings. In jurisdictions where written rules on public comment are provided, the wording of the rules is often imprecise and subject to varying interpretations. As a result, public servants tend to be uncertain or confused concerning the forms of public comment in which they may engage. The major reason for the lack of satisfactory direction in the sphere of public comment is that drawing the line between acceptable and unacceptable public comment is a very difficult task. Nevertheless, on the basis of existing rules, of decisions of courts and administrative tribunals, and of experience in other countries, some guidance can be provided.

It is useful to begin by explaining the various forms of public comment. These forms range from public comment that public servants make in the ordinary course of carrying out their official duties to forms that are likely to result in their dismissal. The involvement of public servants in public comment can take the form of either writing or speaking in public for one or more of the following purposes:[26]

1. Providing information and analysis of a scientific or technical nature for consideration primarily by professional colleagues within or outside government;
2. Describing administrative processes and departmental organization and procedures;
3. Explaining the content, implications and administration of specific government policies and programmes;
4. Explaining the nature of the political and policy process in government;
5. Discussing, within the framework of governmental or departmental policy, the solution of problems through changes in existing programmes or the development of new programmes;
6. Discussing issues on which governmental or departmental policy has not yet been determined;
7. Advocating reforms in the existing structures or procedures of government;
8. Commenting in a constructively critical way on government policy or administration;
9. Criticizing existing or proposed government policies, programmes or operations;

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[26] This list has been adapted from Kernaghan, *supra*, note 2, at 449.

10. Using confidential information to criticize existing or proposed government policies, programmes or operations;

11. Exposing government wrongdoing in the form of illegal, corrupt or wasteful government action;

12. Using confidential information to expose government wrongdoing in the form of illegal, corrupt or wasteful government action; and

13. Commenting in an overtly partisan way on public policy issues or on government policy or administration.

Some forms of public comment are clearly acceptable and others are clearly unacceptable. But there is a fuzzy border area where public servants tread at their peril. In practice, most public servants in Canadian governments draw the line after the first five forms of public comment; each of these forms is either acceptable or required as part of a public servant's official duties. Involvement in public comment beyond this point becomes progressively risky, since it may be regarded as inappropriate, forbidden or illegal.

Among the various forms of public comment, even the discussion of solutions to the problems of existing policies and programmes involves public servants in politics in the broad sense explained earlier. Most public and media attention is focussed, however, on those forms of public comment that constitute — or seem to constitute — criticism of government and that affect, therefore, the reality or appearance of political neutrality. Even so-called constructive criticism is a hazardous undertaking because the significance of public statements is likely to be measured more by their impact than by their intent. The political advantage of allowing free expression of critical comment by public servants is often not immediately obvious to Cabinet ministers. Thus, public servants whose contributions to public dialogue are perceived by political or administrative superiors as criticism of government are in an unenviable position, no matter how constructively motivated their comments may have been.

There is a close relationship between public comment and political partisanship. Public servants who run for office cannot easily avoid commenting on political issues, but they are well advised to show moderation if they wish to return to the public service. Moreover, public servants are generally not permitted to speak publicly during an election campaign for or against a political party or candidate. Determining what constitutes politically partisan comment *between* elections is more problematic. Public criticism of government by public servants who are obviously motivated by political partisanship is unacceptable in most Canadian governments, including Ontario. In practice, however, it may be difficult to draw a distinction between public statements motivated by partisan considerations and those motivated by concern for the public interest. Given the difficulty of making such distinctions, it is understandable in the sphere of public comment that governments sometimes err on the side of undue restraint and that public servants err on the side of undue caution.

The fifth tenet relates to the principle of anonymity: "public servants provide forthright and objective advice to their political masters in private and in confidence. In return, political executives protect the anonymity of public servants by publicly accepting responsibility for departmental decisions."

The constitutional conventions of public service anonymity and ministerial responsibility require that public servants work anonymously in support of ministers who accept publicly both credit and blame for government decisions.[27] The doctrine of individual ministerial responsibility prescribes that ministers be held accountable to the legislature, and through the legislature to the public, both for their own decisions and for the decisions of their administrative subordinates. In theory, this means, first, that ministers must explain and defend before the legislature the actions of their departments, and, secondly, that ministers must tender their resignation in the event of serious departmental mismanagement.

The validity of this doctrine in practice has been questioned, because very few ministers, in Canada or in other parliamentary democracies, have resigned as a result of actual or alleged mismanagement by their departments. Ministers claim with justification that, given the scale and complexity of departmental operations, they cannot reasonably be expected to have personal knowledge of even a small proportion of the administrative acts of their subordinates. Moreover, even when it appears that ministers have been involved in departmental mismanagement, the usual practice has been for the government to protect ministers from calls for their resignation. A matter of individual ministerial responsibility is thereby turned into a matter of collective ministerial responsibility.[28]

While ministers are not usually obliged to resign because of mismanagement in their departments, they are required to answer to the legislature for the policies, programmes and operations of their departments.[29] This requirement is centrally important, because it focusses responsibility for departmental actions on the minister. Public servants are, as a result, sheltered from public attack and their anonymity is protected. There have been some instances in recent years where ministers have failed to exercise their responsibility to protect the anonymity of departmental officials and have gone so far as to name and blame them in public. It is not clear to what extent these aberrations from normal practice have constituted serious incursions on the general commitment to the doctrine of political neutrality in general and public service anonymity in particular.

The anonymity of public servants has been somewhat diminished by other developments, however. These include the increased involvement of public servants in public comment, their more frequent appearances before legislative committees, and their greater prominence in the news media. Public comment by public servants poses an especially significant threat to the preservation of official anonymity.[30] Public servants who make public statements become more visible in society, whether their statements constitute criticism of government or simply the performance of official duties. In recent years, public servants have been required to testify more frequently before legislative committees where, as in all their public discussion, they must confine their comments to the explanation of government policies. The justification of these policies remains the responsibility of their minister. The more active role of the news media in publicizing the comments, and indeed the identity, of public servants has also contributed to a gradual reduction in public service anonymity.

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[27] See Kernaghan, "Power, Parliament and Public Servants in Canada: Ministerial Responsibility Revisited" (1979), 5 Canadian Public Policy 383, and Denton, "Ministerial Responsibility: A Contemporary Perspective," in Schultz *et al.* (eds.), *The Canadian Political Process* (3d ed., 1979), at 344-62.

[28] See Denton, *ibid.*, at 354-58.

[29] *Ibid.*

A recent study in Ontario showed that "[a]s far as can be determined from interviews with Ontario civil servants, they are under no illusion that their identities and functions are hidden from the public."[31] Moreover, "[w]ho they are and what they do is common knowledge, especially to the interest group leaders with whom their minister must deal, and to the press and members of the opposition. What anonymity seems to mean to these officials is that their individual views on specific subjects are not known, or at least are not attributed to them in public."[32]

The sixth and final tenet of the traditional doctrine of political neutrality is the tenure principle: "public servants execute policy decisions loyally and zealously irrespective of the philosophy and programmes of the party in power and regardless of their personal opinions. As a result, public servants enjoy security of tenure during good behaviour and satisfactory performance."

The issue of security of tenure for public servants demonstrates especially well the interdependent nature of the components of the doctrine of political neutrality. Public servants who wish to enjoy permanence in office are well advised to avoid appointment or advancement on the grounds of patronage; to refrain from unacceptable forms of political partisanship or public comment; and to seek so far as possible to retain their anonymity.

A primary reason for seeking to preserve a politically neutral public service is to ensure continuity of administration by knowledgeable and impartial public servants despite changes of government. Under this system, public servants are expected to serve loyally the government of the day, regardless of its political hue. Both the ministers of the governing party and potential ministers from opposition parties should be able to have confidence in the integrity and impartiality of permanent public servants. In return, public servants can expect to enjoy security of tenure.[33]

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[30] See Mallory, *The Structure of Canadian Government* (1971), at 115.

[31] Eichmanis, *Freedom of Information and the Policy-Making Process in Ontario* (Research Publication 13, Ontario Commission on Freedom of Information and Individual Privacy, 1980), at 141.

[32] *Ibid.*, at 142.

There is some support, however, for the "politicization" of the public service, that is, the appointment, especially to senior posts in regular government departments, of persons who are committed to the philosophy and policies of the governing party. It is argued that these persons would bring new ideas and strong devotion to both the development and implementation of government programmes and that they would assist ministers to control the activities of the non-political career public servants.[34] Under this system, senior advisors in regular government departments would be political partisans who would be expected to participate in partisan political activity and who would be more visible to the public and therefore less anonymous. Their term of office would last only as long as that of the party they support. A few provincial governments in Canada have moved towards a system of political appointments at the senior levels of the regular public service; in most jurisdictions, however, the advantages of retaining a politically neutral public service have been deemed to outweigh those of politicizing the service.

By way of summary, the ethos of a politically neutral public service in the contemporary Canadian context can be explained in terms of a reformulation of the several tenets of the traditional doctrine.

First, politics, policy and administration are closely interrelated, not separated. Politicians and public servants are involved in both the making and the implementation of policy decisions. Elected officials, notably Cabinet ministers, make final decisions on major policy matters, but public servants influence these decisions and make decisions of their own under authority delegated by Cabinet and the legislature.

Second, the vast majority of public servants are appointed on the basis of merit, or fitness for the job. A substantial number of public servants are appointed on the grounds of contributions to the governing political party but, at a senior level, most of these political appointments are made to agencies, boards or commissions rather than to regular government departments. Patronage appointments continue to be made at relatively low levels of the public service in several Canadian jurisdictions.

Third, public servants *do* participate in certain partisan political activities. In the interest of preserving a politically neutral public service, this participation is limited in most Canadian jurisdictions to such low-profile activities as making financial contributions to and holding membership in a political party. Public servants who wish to stand for public office are required in most jurisdictions to seek permission for a leave of absence. They are also forbidden to engage in partisan political activity while at work, and their political and administrative superiors are forbidden to coerce them into performing partisan work.

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[33] We understand, however, that it has become the practice in Ontario in recent years to limit some senior appointments — for example, those of deputy ministers — to fixed terms of three years.

[34] With respect to recent developments in the U.K. in this respect, see "No, Minister", *The Economist*, London (May 31, 1986).

Fourth, public servants may not express their *personal* views on government policies or administration, especially if these views are critical of the government or partisan in nature. Moreover, they are forbidden by law and tradition to engage in any forms of public comment in which they make use of confidential information to which they are privy by virtue of their official position. Many public servants are, however, *required* to engage in public comment during the performance of their official duties. The difficulty of drawing a clear line between permissible and unacceptable forms of public comment prompts public servants to be very cautious when speaking or writing for public consumption.

Fifth, public servants provide their ministers with objective advice in confidence. In return, ministers normally fulfill their responsibility to protect the anonymity of public servants by shielding them from public criticism. Public service anonymity has been diminished to some extent by the role that public servants are required to play in explaining policies and programmes to the public and to legislators. In fulfilling this role, public servants must be careful not to infringe on their minister's sphere of responsibility by justifying or speculating on government policy.

Sixth, public servants are expected to carry out the decisions of their minister with the same measure of loyalty and zeal whether they agree with the decisions or not. In return, public servants can usually expect to enjoy permanence in office, except in the event of staff cutbacks, unsatisfactory performance or bad behaviour. With a change of government, however, public servants who are political appointees are likely to lose their positions.

As the foregoing discussion indicates, the doctrine of political neutrality, as traditionally understood, has evolved over time and adapted to meet changing political, administrative and social conditions. Over the past two decades, for example, as a result of the entrenchment of the merit system and a corresponding decrease in patronage appointments, restrictions on partisan political activity by public employees have been eased. Similarly, as government has become more complex and more participatory, public service anonymity has declined, with public servants engaged, as part of their duties, in explaining government policy to the public. The question that is of vital concern for our purposes is whether, in furtherance of the objective of increased democratic rights, additional changes can be made to the two basic tenets of the doctrine of political neutrality with which we are concerned — that public servants do not engage in public comment or in partisan political activity — without imperilling public service neutrality.

The need for a politically neutral government service is widely acknowledged. There is a strong and obvious public interest in a public service that is, and is perceived to be, impartial.[35] Underlying this concern for public service impartiality is the public interest in efficiency and continuity of administration of the affairs of the government.[36]

There is, however, disagreement concerning whether, and the extent to which, restrictions on partisan political activity and public comment can be relaxed without undermining political neutrality. Those who would restrict political activity and public comment see the existing restrictions as essential means of ensuring public service neutrality, and argue that increased partisan political activity and public comment on the part of public servants would affect the real and perceived impartiality, and the efficiency, of the public service in a number of deleterious ways.

Without attempting at this stage to evaluate the arguments advanced in favour of maintaining the *status quo*, we wish to summarize briefly the ways in which it has been suggested that an increase in political activity and public comment would undermine the interests that political neutrality is intended to ensure.

First, it is pointed out that it is an essential feature of a politically neutral public service that both the government of the day and opposition parties should be able to have confidence that public servants will offer impartial and objective policy advice and implement government policies loyally, regardless of their personal political views and affiliation. In return, public servants are shielded from public criticism under the convention of ministerial responsibility, and enjoy security of tenure in the event of a change of government — factors that contribute to efficiency and continuity of administration of the affairs of government. It is argued that high-profile partisan political activity and public comment are likely to undermine the confidence of the government of the day and opposition parties alike in the impartiality of those upon whom they depend, or will depend, for policy advice and implementation, with a number of adverse consequences.

With respect to the government of the day, it is understandable that ministers should lose confidence in the impartiality of public servants who engage actively in high-profile partisan politics or public comment, especially if these activities are in opposition to the government of the day. Participation in such activities reduces public service anonymity, not only because the public servants involved become highly visible to the public, but also because such participation tends to undermine the responsibility of ministers for sheltering these public servants from political and public criticism. Ministers cannot reasonably be expected to look favourably upon public servants who embarrass them or the government as a whole. Moreover, in the face of public criticism from public servants exercising certain forms of political rights, ministers may see substantial advantage in making patronage appointments to public service posts. This, in turn, would threaten the security of tenure of public servants in the event of a change of government.

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[35] See, for example, Canada, *Report of the Task Force on Conflict of Interest: Ethical Conduct in the Public Sector* (1984), at 46, where it is stated as follows:

> [T]he public interest demands the maintenance of political impartiality in the public service and of confidence in that impartiality as an essential part of the structure of government in this country.

[36] See *United Public Workers of America v. Mitchell*, 330 U.S. 75, at 121-22, 67 S.Ct. 556, at 580 (1947), *per* Douglas J., quoted *infra*, ch. 5.

Similarly, opposition political parties are unlikely to believe, when they come to power, that they can be loyally and impartially served by public servants who have promoted the partisan interests of the government, and will be tempted to replace such persons with their own supporters.

Secondly, it is argued that the objective of *public* confidence in government service impartiality would be seriously impaired if the political affiliation of public servants and their views on government policy were widely known.[37] While citizens have become increasingly aware that public servants, particularly at the more senior levels, are required to play an extremely influential role in the development and implementation of public policy, they should be able to be confident that the advice given and decisions made by such public servants are not affected by partisan political considerations. If the partisan political preferences of such civil servants were known, or if such civil servants were permitted to criticize government policy or programmes in public, it is understandable that citizens might be skeptical about the objectivity of policy advice rendered, or the ability of the public servants in question to carry out government policy effectively.

It is also pointed out that the image of the public service held by members of the public is determined to a very large extent by their interaction with public servants working in field offices in communities across the Province. While most of these public servants are employed at the middle and lower levels of the administrative hierarchy, many of them have discretionary powers to make decisions of substantial significance for individual citizens. It is therefore important, it is asserted, that these public servants refrain from any political activities that might arouse concern that their decisions may be influenced by partisan politics.

Indeed, some proponents of the current restrictions see a danger in permitting increased political activity by civil servants, regardless of their level in the administrative hierarchy, on the ground that the resulting dramatic increase in political activity on the part of civil servants[38] would affect detrimentally the public perception of public service impartiality. The former Chairman of the federal Public Service Commission has stated recently that, "since most of the public servants who serve the general public on a daily basis are clerks and junior officers, their visible involvement in partisan politics would, over time, inevitably jeopardize the perception of impartiality of the institution in the eyes of the public."[39]

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[37] Those who favour maintaining the existing restrictions on partisan political activity concede that it does violence to public confidence in public service neutrality to permit public servants who have taken a leave of absence in order to be candidates for provincial or federal office to return to their jobs following leave. They do not, however, see this inconsistency as an argument in favour of broader participation by public servants in other forms of high-profile political activity. It is asserted that the impact of the latter change on political neutrality would be far greater than that of the current rules relating to candidature, as, relative to the few who are likely to run for public office, many more would wish to participate in other activities that do not involve a leave of absence.

The most enduring argument against the participation of public servants in high-profile partisan politics is that political partisanship tends to lead to or expand the practice of political patronage, and thereby to undermine the merit system of appointments to the public service.[40] As explained earlier, the restrictions imposed on the political activities of public servants during most of this century were expressly designed to reduce or eliminate political patronage, but were considerably loosened by most Canadian governments during the 1960's and 1970's. In response to the argument that patronage appointments no longer pose a threat to public service neutrality and efficiency, those who are concerned about the possible negative effects of expanding the range of permissible political activities acknowledge that the merit principle of staffing has been entrenched, but emphasize that the merit system — the mechanism by which the merit principle is operationalized — permits significant departures from the merit principle. Departures from the merit principle that involve partisan politics[41] include the making of order-in-council appointments to senior public service posts and to the political staff of ministers. It is noted that, since the 1960's, there has been an expansion in both categories of appointment. This gradual movement toward politicization of the senior public service has been accompanied by the continuing practice in several Canadian jurisdictions of making patronage appointments to low-level positions.

In addition to the concern that increased political activity would lead to an increase in patronage appointments to the public service, it is argued that, if the partisan political views of public servants were known, career prospects might be influenced by partisan considerations, rather than by merit.[42] Not only might career advancement be on the basis of political affiliation, but the careers of public servants could suffer from participation in partisan politics that, for whatever reasons, did not please their superiors.[43]

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[38] A survey of 1,101 federal public servants conducted in 1985 at the request of the federal Public Service Commission found that 30.8 percent of the respondents would engage more actively in partisan politics if their political rights were expanded: Carleton University, School of Journalism, *Report on Attitudes of Public Servants to Political Restrictions on the Public Service* (1985) (hereinafter referred to as "Carleton Survey").

[39] Gallant, "Service Above Party" (1986), 7 Policy Options Politiques, No. 2, 8, at 9.

[40] In the Carleton Survey, *supra*, note 38, 45 percent of the 1,099 respondents felt that increased political participation by public servants might adversely affect job security. 40.67 percent of the respondents specified with more particularity the types of consequences they foresaw. Of this group, 19.8 percent (or 8.1 percent of the total respondents) expected increased participation to result in partisan selection for jobs, while 33 percent (or 13.4 percent of the total respondents) indicated a more general concern that jobs might be jeopardized. 43.9 percent of the respondents felt that increased political participation would have no effect on job security.

[41] Some of the deviations from the merit principle have nothing to do with the matter of partisan politics; rather, they are designed to achieve such values as equity and representativeness in staffing the public service.

The potential for this type of interference with the merit principle and the resulting loss in the effectiveness and efficiency of the public service are addressed in the following quotation from the U.K. *Report of the Committee on the Political Activities of Civil Servants*:[44]

> There is finally to be considered the harmful effect upon the Service itself if the political allegiance of individual civil servants became generally known to their superior officers and colleagues. If a Minister began to consider whether A, on account of his party views, might be more capable of carrying out his policy than B, the usefulness of B would be limited and the opportunities of A would be unfairly improved. This would become known, and a tendency to trim the sails to the prevailing wind would be one consequence. Another would be a cynicism about the reasons for promotion very damaging to morale. If it be thought that we have exaggerated this risk, we would point to the experience of those countries which are suffering from the consequences of taking a course different from our own. The danger is, we believe, a real one. It may result from only small beginnings, but once begun, it produces a snowball effect, which is difficult, if not impossible, to check. Once a doubt is cast upon the loyalty of certain individuals or upon the equity of the promotion-machinery, an atmosphere of distrust may rapidly pervade an office and affect the arrangement of the work and damage the efficiency of the organisation.

As the above-quoted remarks confirm, related to and underlying the public interest in political neutrality is a concern for the efficient and effective administration of government. In addition to the matter discussed above, those who would maintain the existing restrictions point to a number of ways in which efficiency and effectiveness would be undermined by changes in the working environment.

First, it is argued that a substantial increase in the participation of public servants in partisan politics, and in public comment critical of government policy, would cause conflict among co-workers and between management and employees.[45]

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[42] The Carleton Survey of federal public servants, *supra*, note 38, found that 46.3 percent of the respondents thought that expanding the range of permissible political activity would affect the career prospects of public servants; of the 41.5 percent of total respondents who specified the nature of their concerns, 65.6 percent thought that the influence would be in relation to job promotion prospects.

[43] The impact of involvement in partisan politics on the career prospects of public servants can be illustrated by reference to *Re Singh and Treasury Board (Department of National Health and Welfare)*, unreported (June 4, 1979, P.S.S.R.B., O'Shea). Mr. Sant P. Singh was granted a leave of absence from his job as an economist in the federal Department of National Health and Welfare to run for the Progressive Conservative Party in the 1974 general election. He was unsuccessful in the election and returned to the public service. A few months after his return, when he was denied a promotion and pay increase, he lodged a grievance with the Public Service Staff Relations Board on the grounds that he had been punished for his political activity. The Board found that he had been the victim of political bias and awarded him damages of $9,300.00.

[44] (Cmd. 7718, 1949), para. 43, at 16.

It is also argued that extending political rights to public servants would make them vulnerable to coercion by superiors who want them to support a particular political party or candidate. The rules on political partisanship in several jurisdictions reflect this concern, and attempt to protect public servants from being coerced or manipulated into involvement in partisan political activities.[46]

Pressures on public servants to engage in partisan politics can, however, be exercised in such a subtle or indirect manner that they are difficult to detect and, therefore, to control. Some public servants will succumb to such pressures for the sake of preserving or enhancing their career prospects. Moreover, public servants who are subjected to coercion are unlikely to complain for fear of reprisals.

It is pointed out that if public servants are pressured by their superiors to participate in certain kinds of partisan politics, it is comforting for them to be able to say that they are forbidden to engage in such activities; it is more difficult for them to refuse to participate in these activities if they are in fact permitted to do so. In addition, it is more tempting for political or administrative superiors to pressure public servants to engage in political activities if the permissible activities include high-profile partisanship that can be of considerable benefit to political parties or candidates.[47]

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[45] The Carleton Survey of federal public servants, *supra*, note 38, is suggestive in this regard: 28.1 percent of 1100 respondents thought that increased political activity would lead to more conflicts and confrontation with their fellow workers, and 52.8 percent of 1097 respondents felt that it would lead to more problems between management and employees.

[46] For example, in Saskatchewan, *The Public Service Act*, R.S.S. 1978, c. P-42, s. 50(1), provides as follows:

> 50.-(1) No person in the public service shall:
>
> (a) be in any manner compelled to take part in any political undertaking, or to make any contribution to any political party, or be in any manner threatened or discriminated against for refusing to take part in any political undertaking; or
>
> (b) directly or indirectly use or seek to use the authority or official influence of his position to control or modify the political action of any other person; ...

[47] Another dimension to the issue of public servant coercion is the possibility that they could be coerced into such involvement by public service unions. This issue is at the forefront of discussions of political rights for public servants in the United States. (See discussion *infra*, ch. 4, sec. 4(a)(iv)a.) Although the great majority of public servants in Canada are members of public service unions, and although the three largest unions in Canada are public service unions, similar problems have not arisen here. The main reason appears to be that public service unions in Canada are typically barred from

The importance of the role of political activity and public comment by public servants in relation to the vital interests sought to be advanced by the doctrine of political neutrality will be apparent from the foregoing discussion. Changes in the extent of the political rights that public servants are permitted to exercise may have implications for the doctrine of political neutrality and for the closely related conventions of ministerial responsibility and public service anonymity. While the meaning and application of these conventions have evolved over the years, they remain as central features of the constitutional framework within which Canadians are governed. Thus, to maintain the integrity of our system of government, it is necessary to ensure that the participation of public servants in partisan political activities and public comment is permitted to an extent and in a manner consistent with maintaining the political neutrality of the public service.

There is a continuing quest for the optimum balance between the values of neutrality, ministerial responsibility and anonymity on the one hand, and those of open government and freedom of expression and association on the other. The restrictions under existing Ontario law on the rights of public servants to engage in partisan political activity and public comment concerning government policy represent one assessment of how that balance should be struck, a judgment made over two decades ago and prior to the advent of the *Canadian Charter of Rights and Freedoms*.[48] It is to a discussion of the present Ontario law that we now turn.

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partisan political activity as a condition of maintaining bargaining rights. See, for example, *Crown Employees Collective Bargaining Act*, R.S.O. 1980, c. 108, s. 1(1)(g).

[48] Being Part I of the *Constitution Act, 1982*, which is Schedule B of the *Canada Act 1982*, c. 11 (U.K.), as am. by the Constitution Amendment Proclamation, 1983, SI/84-102, effective June 21, 1984.

CHAPTER 3

THE CURRENT LAW IN ONTARIO

1. GENERAL INTRODUCTION

The five specific issues that the Commission has been asked by the Attorney General's Letter of Reference to consider relate to two general topics: the extent to which Crown employees should be entitled to engage in political activity, including public comment concerning government policy, and the degree to which Crown employees should be required to preserve confidentiality concerning government information. The existing law bearing upon these matters draws on two sources: the general law governing relations between an employer and an employee, and, particularly, the common law duties of loyalty, good faith, and confidentiality owed to the former by the latter; and, more narrowly, the law governing the special position of Crown employees in a Parliamentary system of government, under which independence and impartiality on the part of the public service are required. With the enactment of the *Canadian Charter of Rights and Freedoms*,[1] the principles emanating from both these sources must be re-evaluated to determine whether they conform to the standards set out therein.

In this chapter, we shall first discuss the common law principles that bear upon political activity by Crown employees, and the nature and extent of their obligation to maintain the confidentiality of government information. We shall then examine the legislation relating to political activity and confidentiality. Finally, we shall examine the Charter and its possible implications with respect to these matters.

2. THE COMMON LAW BACKGROUND: THE EMPLOYEE'S DUTIES OF LOYALTY, GOOD FAITH, AND CONFIDENTIALITY

(a) INTRODUCTION

In this section, the Commission will consider the common law duties of loyalty, good faith, and confidentiality[2] owed by employees to their employers. These obligations, in conjunction with the oath of secrecy and other statutory restrictions, circumscribe the right of Crown employees to comment on or criticize government actions or policies and to disclose information that comes to their knowledge or possession as a result of their employment. But, in so doing, the common law duties also advance essential "public interests".

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[1] *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, which is Schedule B of the *Canada Act 1982*, c. 11 (U.K.), as am. by the Constitution Amendment Proclamation, 1983, SI/84-102, effective June 21, 1984.

One function, as we have said in the General Introduction to this chapter, relates to the proper management of employer-employee relations. To this extent, the common law duties operate in the public sector in much the same way as they operate in the private sector.

But the duties of loyalty, good faith, and confidentiality also have another purpose, unique to their role in government. Our constitutional system of responsible Cabinet government mandates the maintenance of an impartial, efficient, and professional public service. By demanding allegiance and fidelity to the government of the day, regardless of the personal political views of individual Crown employees, and by requiring the preservation of confidentiality for government information, the common law duties help to ensure the neutrality, impartiality, and integrity of the public service[3] and, thereby, serve to buttress the constitutional role of the public service within our system of government.

The common law duties of loyalty, good faith, and confidentiality should be seen, then, as having two essential roles, both of which are manifestations of the "public interest": to secure the sound administration of the various branches of government, and to foster and maintain the traditional independent role of the public service. However, it is essential to emphasize that the "public interest" so served is not monolithic; rather, it is the result of a delicate balancing of frequently competing interests, that of the employee wishing to exercise individual rights of expression and to engage in political activity, and that of the government, wishing to maintain the existence and appearance of independence and impartiality in the public service and to ensure effective and efficient administration in the Province.

We turn now to a consideration of the common law duties. Our evaluation of the need for reform in this area will be a reflection of how, in our view, this balance has hitherto been struck.

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[2] In this Report, we shall refer to these duties as "common law" duties. This reference is to distinguish these duties from those that arise by statute, for example, rather than to distinguish them from duties that arise at equity. Indeed, as we shall see, equity has been of critical importance, particularly in the case of the duty of confidentiality.

[3] See, for example, the judgment of Chief Justice Dickson in *Re Fraser and Public Service Staff Relations Board* (1985), 23 D.L.R. (4th) 122 (S.C.C.), at 133-34 (reproduced in text following note 56, *infra*), aff'ing *Fraser v. Public Service Staff Relations Board*, [1983] 1 F.C. 372, (1982), 142 D.L.R. (3d) 708 (C.A.), aff'ing *Re Fraser and Treasury Board (Department of National Revenue)* (1983), 5 L.A.C. (3d) 193 (P.S.S.R.B., Kates), and the decision of Adjudicator Garant in *Re Goyette and Guindon and Treasury Board (Unemployment Insurance Commission, Department of Manpower and Immigration)*, unreported (July 12, 1977, P.S.S.R.B., Garant), at 7-8, reproduced in text following note 29, *infra*.

(b) THE COMMON LAW DUTIES

(i) General

At common law, an employee owes to his or her employer the general duties of loyalty, good faith, and, under appropriate circumstances, confidentiality. None of these terms is a defined term of art; instead, common sense notions of what they entail appear to inform their legal content. Of these duties, loyalty, or "fidelity", is the most comprehensive, with good faith and confidentiality forming subspecies of the larger duty.[4] Loyalty embraces the obligation to perform lawful work assigned diligently and skillfully;[5] to refrain from any sort of deception related to the employment contract;[6] to avoid any relationships, remunerative or otherwise, giving rise to an interest inconsistent with that of the employer;[7] and, finally, to conduct oneself, at all times, so as not to be a discredit to one's employer.[8]

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[4] The subordinate status of the duty of confidentiality is true only during the course of the employment relationship, since that duty can remain even after the term of employment has ended. See Gurry, *Breach of Confidence* (1984), at 177, 198-99, and 252-54.

The duty of good faith appears to have a rather shadowy independent existence; it is often fused with the more general duty of loyalty: see *Faccenda Chicken Ltd. v. Fowler*, [1986] 1 All E.R. 617 (C.A.), at 619.

[5] See *Robb v. Green*, [1895] 2 Q.B. 1, aff'd [1895] 2 Q.B. 315 (C.A.), and *Wessex Dairies Ltd. v. Smith*, [1935] 2 K.B. 80, [1935] All E.R. Rep. 75 (C.A.).

[6] This obligation is an implied term of any employment contract: see, generally, *Williston on Contracts* (3d ed., 1957), Vol. 9, §1014C, and authorities cited.

[7] See *Hivac Ltd. v. Park Royal Scientific Instruments Ltd.*, [1946] Ch. 169, [1946] 1 All E.R. 350 (C.A.); *Re Consumers' Gas Co. and International Chemical Workers, Local 513* (1972), 1 L.A.C. (2d) 304 (Brown); *Re Van der Linden and The Crown in Right of Ontario (Ministry of Industry and Tourism)* (1981), 28 L.A.C. (2d) 352 (G.S.B., Swinton), and *Re Regional Municipality of Hamilton-Wentworth and Canadian Union of Public Employees, Local 167* (1978), 18 L.A.C. (2d) 46 (Kennedy). This duty is particularly important in the case of a fiduciary: see *Broughton v. Broughton* (1855), 5 De G.M. & G. 160, 25 L.J. Ch. 250, and *Boulting v. Association of Cinematograph, Television and Allied Technicians*, [1963] 2 Q.B. 606, at 638, [1963] 1 All E.R. 716 (C.A.) (subsequent reference is to [1963] 2 Q.B.).

The finding of a conflict of interest does not depend on fraud or on absence of good faith: see *Boulting v. Association of Cinematograph, Television and Allied Technicians*, *supra*, this note, at 635-36.

One arbitrator has discussed conflicts of interest in regard to the public sector worker as follows:

> The essential requirements are that the public servant should serve only one master and should never place himself in a position where he could be even tempted to prefer his own interests or the interests of another over the interests of the public he is employed to serve.

McKendry and Treasury Board, unreported (May 31, 1973, P.S.S.R.B., Jolliffe), cited in *Re Regional Municipality of Hamilton-Wentworth*, *supra*, this note, at 55. See, also, *Re Ville de Granby and Fraternité Des Policiers De Granby Inc.* (1981), 3 L.A.C. (3d) 443 (Frumkin). It may not always be easy to identify when a conflict of interest situation arises. Accordingly, any doubt serves to mitigate the penalty that may be imposed for failure to disclose a conflict of interest: see, for example, *Re Regional Municipality of Hamilton-Wentworth*, *supra*, this note, at 57.

The duty of good faith requires an employee to perform assigned tasks according to the best interests of his or her employer. Any degree of undisclosed self-seeking in carrying out the employee's employment obligations, even at no apparent cost to the employer, runs counter to this duty.

Finally, an employee may be under a duty of confidentiality, that is, a duty to keep certain information confidential until released from that duty by the employer. The duty may arise by contract; or it may be imposed by equity on an employee whenever the employer entrusts to him or her "confidential" information on the understanding that such information is not to be disclosed without authorization; or a general duty of confidentiality may arise by virtue of the particular relationship between the employer and the employee.

We now turn to consider separately the common law duties of loyalty and confidentiality. Given the paucity of case law pertaining specifically to the duty of good faith, no further mention of it will be made here.

(ii) The Duty of Loyalty

In regard to the public sector, adjudicators at the federal level have adopted the formulation of the public servant's duty of loyalty proposed by Sir C.K. Allen:[9]

> [T]he civil servant is expected to give, and with very few exceptions does give in full measure, the qualities of loyalty and discretion. He is not to obtrude his opinion unless it is invited, but when it is needed he must give it with complete honesty and candour. If it is not accepted, and a policy is adopted contrary to his advice, he must, and invariably does, do his best to carry it into effect, however much he may privately dislike it. If it miscarries, he must resist the human temptation to say, 'I told you so'; it is still his duty, which again he invariably performs, to save his Minister from disaster, even if he thinks that disaster is deserved.

In the British Columbia labour arbitration case of *Re Ministry of Attorney-General, Corrections Branch and British Columbia Government Employees' Union*,[10] Arbitrator Weiler espoused a comprehensive, modern formulation of the public servant's duty of loyalty or fidelity, particularly in regard to adverse public comment concerning the employer. The two grievors, employees of the British Columbia Corrections Branch, had embarked on a media crusade to obtain a judicial inquiry into what they alleged were serious irregularities within the Corrections Branch. In view of their vitriolic, and, as it turned out, unfounded, attack on the government, their refusal to heed warnings to cease speaking to the media, their failure to resort to internal channels for the airing of their complaints, and the public fears needlessly aroused in regard to sensitive issues, Arbitrator Weiler upheld their dismissal. According to Arbitrator Weiler, the employee's duty of loyalty, in the context of public criticism of his employer and the disclosure of confidential information, involved the following "dimensions":[11]

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[8] See, generally, *Williston on Contracts*, *supra*, note 6, Vol. 9, §1014C, and authorities cited.

[9] Allen, *Laws and Orders* (3d ed., 1965), at 281-82. This standard was first relied upon federally in the Appeal Board case of *Kroeker*, unreported (April 9, 1965, Appeal Board), discussed *infra*, this sec.

[10] (1981), 3 L.A.C. (3d) 140 (Weiler) (hereinafter referred to as "*Lehnert*").

> An employee is expected to give his employer both loyalty and discretion, to serve his employer in good faith and fidelity. Conversely, an employee does not fulfill his duty of loyalty if he deliberately does something which is prejudicial or likely to be prejudicial to the interests or reputation of his employer. With respect to public criticisms of the employer, the duty of fidelity does not impose an absolute 'gag rule' against an employee making any public statements that might be critical of his employer.... The duty of fidelity does not mean that the Daniel Ellsbergs and Karen Silkwoods of the world must remain silent when they discover wrongdoing occurring at their place of employment. Neither the public nor the employer's long-term best interests are served if these employees, from fear of losing their jobs, are so intimidated that they do not bring information about wrongdoing at their place of employment to the attention of those who can correct such wrongdoing. However, the duty of fidelity does require the employee to exhaust internal 'whistle-blowing' mechanisms before 'going public'. These internal mechanisms are designed to ensure that the employer's reputation is not damaged by unwarranted attacks based on inaccurate information. Internal investigation provides a sound method of applying the expertise and experience of many individuals to all problems that may only concern one employee. Only when these internal mechanisms prove fruitless may an employee engage in public criticism of his employer without violating his duty of fidelity.[12]

The general duty of loyalty has been given context in a number of federal arbitral decisions, culminating in *Re Fraser and Treasury Board (Department of National Revenue)*, an arbitral decision upheld by the Supreme Court of Canada.[13] These decisions focus on the duty of loyalty as it relates to critical comment on government policies and activities.

In *Kroeker*,[14] a senior actuary with the Department of Insurance had held a press conference in which he attacked, most intemperately, the Liberal government's proposed Canada Pension Plan. The vehemence of his criticism, especially in light of past warnings for remarks made on other occasions, was held sufficient to justify his dismissal. In *Re Vaillancourt and Treasury Board (Department of Manpower and Immigration)*,[15] Adjudicator Meyer stated that

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[11] *Ibid.*, at 162-63.

[12] The issue of "whistleblowing", or the disclosure of information allegedly evidencing serious wrongdoing, will be considered *infra*, this ch., sec. 2(b)(iii)c.

[13] *Supra*, note 3.

[14] *Supra*, note 9.

[15] *Re Vaillancourt and Treasury Board (Department of Manpower and Immigration)*, unreported (March 14, 1973, P.S.S.R.B., Meyer).

Kroeker "establishes the need for discretion and loyalty in the public expression of any personal views a civil servant might have on government policy".[16]

In *Vaillancourt*, three employees of the Department of Manpower and Immigration faced disciplinary action in regard to a press conference they held, in their capacity as union officials, to make public their complaints that increased workloads jeopardized the effective performance of their jobs. Adjudicator Meyer faulted the employees for going public, for allowing their comments to range beyond strictly employment matters, for citing Opposition support for their position, and for taking advantage of the federal election that was then underway. In his decision, Adjudicator Meyer commented favourably on an article by Dussanet and Bernatchez,[17] cited by the employer, as follows:[18]

> [T]he authors state that it is generally admitted that a civil servant has the obligation to restrain himself, which flows from two principal obligations: 1. the rule of hierarchical obedience for reasons of administrative efficiency and 2. the rule of loyalty and fidelity to the government. These two rules together imply that a civil servant must be and be perceived by the public as executing the policies of the administration, and no disagreements should appear in his relations with those members of the public with whom he comes into contact in the course of his duties. This principle of restraint derives from British constitutional law and has the force of law; this principle is supported [by] *Kroeker* ....

However, in light of mitigating factors, Adjudicator Meyer substituted a lesser penalty. The employees had exhibited no serious opposition to important government policy, had acted in good faith, and their comments, while adverse to the government, had been temperate.

In *Stewart*,[19] an engineering procurement officer with the Department of Supply and Services had written an article for the Ottawa *Citizen*[20] in which he attacked what he alleged was the "deplorable state of affairs within the Department", the blame for which "must be laid directly at [Minister] Goyer's own doorstep". He accused the Minister of "having illusions of grandeur" and of having instituted a top-heavy management structure that endangered the continued viability of the Department.

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[16] *Ibid.*, at 19.

[17] Dussanet and Bernatchez, "La Fonction Publique Canadienne et Québecoise" (1972), 15 Can. Pub. Admin. 251, at 321.

[18] *Supra*, note 15, at 21.

[19] *Re Stewart and Treasury Board (Department of Supply and Services)*, unreported (August 12, 1975, P.S.S.R.B., Jolliffe), aff'd *Re Stewart and Her Majesty in right of Canada as represented by the Treasury Board*, unreported (August 26, 1976, P.S.S.R.B., Finkelman), aff'd *Stewart v. Public Service Staff Relations Board*, [1978] 1 F.C. 133 (C.A.).

[20] Editorial page, June 12, 1975.

Adjudicator Jolliffe found that Mr. Stewart's public and strong criticism of his employer amounted to "misconduct". He stated:[21]

> [M]ost employees understand full well that public denunciation of their leaders or superiors is incompatible with the employment relationship, will be regarded as 'misconduct' and will not be tolerated very long by any employer, whether the employer be a company, a trade union or a government.

More specifically, the criticisms made by Mr. Stewart were held to be "inconsistent with the role of a public servant".[22] Adjudicator Jolliffe rejected the argument advanced by Mr. Stewart's counsel that the freedom of speech guarantees under the *Canadian Bill of Rights*[23] granted an employee complete freedom, limited only by the law of defamation and other laws applicable to the public generally. Employees, as well as other individuals in society, are properly subject to certain specific restrictions on their right to free speech based on the nature of their job tasks:[24]

> Some common sense must be brought to bear on the problem. An employer has obligations to employees; in return, those employees have certain obligations to the employer, whether or not they appear in a statute, a regulation or a collective agreement. One such obligation is to render useful service. Another is to refrain from attempting to defeat or frustrate what the employer is trying to do, whether the employer is wise or unwise in trying to do it.

On a reference by Mr. Stewart, the Public Service Staff Relations Board upheld Adjudicator Jolliffe's decision and supporting reasons, and particularly his "common sense" approach to the finding of misconduct:[25]

> Surely, this is an area where common sense must be applied. What had been referred to by counsel for the Aggrieved Employee as 'tradition' and 'morals' [in regard to the duties owed an employer by an employee] are aspects of common sense.

On a subsequent application to the Federal Court of Appeal,[26] Chief Justice Jackett, speaking *per curiam*, upheld the two lower decisions.

In the case of *Re Goyette and Guindon and Treasury Board*,[27] the Public Service Staff Relations Board addressed directly the duty of loyalty owed to the government by its employees. Goyette and Guindon, information officers employed by the Unemployment Insurance Commission and both union officials, had held a news conference in which they condemned the planned merger of the Unemployment Insurance Commission and the Department of Manpower and Immigration. Adjudicator Garant, speaking for the Board, addressed two questions of law, the primary one being: "[D]oes a condemnation of government policy that is *prima facie* neither unlawful nor contrary to public order and morality constitute an offence on the part of public servants responsible primarily for applying that policy?"[28]

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[21] *Re Stewart and Treasury Board (Department of Supply and Services)*, *supra*, note 19, at 52. This statement was subsequently approved by the Federal Court of Appeal, *supra*, note 19, at 135.

[22] *Re Stewart and Treasury Board (Department of Supply and Services)*, *supra*, note 19, at 64.

[23] S.C. 1960, c. 44, Part I (see also Appendix III to R.S.C. 1970).

[24] *Supra*, note 19, at 70.

[25] *Supra*, note 19, at 13-14.

[26] *Supra*, note 19.

[27] *Supra*, note 3.

In approaching this question, Adjudicator Garant noted the dilemma that has been receiving increasing attention in recent years:[29]

> The problem of the political freedom of public servants is one of great importance at this time, although it is poorly understood.
>
> Basically, a public servant has the same political rights as any ordinary citizen. However, these rights must be reconciled with his duty to show loyalty toward the government-employer. Clearly, this government-employer is an employer unlike any other. It is responsible to Parliament for the formulation and implementation of public policies. It cannot fulfil this responsibility, which is related to the public interest, without the help of public servants or officers who are faithful and loyal to it.
>
> The public servant is therefore placed in a dilemma. As a full citizen in a democratic system, he has complete freedom of expression in public matters, including the freedom to criticize; as a public officer, he owes a certain loyalty to the government in power, and this inevitably entails restrictions on his freedom of expression. The government cannot allow those in its employ to prejudice the implementation of policies and the efficiency of the administration through their criticisms or through efforts to destroy the confidence of citizens.
>
> Most judicial systems acknowledge that a public servant is bound by the 'obligation to restrain himself', as it is commonly known, in political matters. This obligation is imposed on the public servant even in his private life, but its requirements vary according to his rank, the nature of his duties, the time and place his criticisms are made and finally, the manner in which they are made.

Adjudicator Garant qualified certain statements in *Vaillancourt* and *Stewart* that appeared to establish an absolute principle that public servants could not criticize government policies and actions even unrelated to their actual employment duties:[30]

> We would prefer to qualify the absolute nature of this principle. To disregard totally the connection that exists between the criticisms put forth and the duties carried out by the public servant is to run the risk of rendering devoid of meaning

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[28] *Ibid.*, at 6.

[29] *Ibid.*, at 7-8.

[30] *Ibid.*, at 9.

> all freedom of expression with respect to government policies which concern the public servant only in his capacity as a private citizen.

Even where criticism does pertain to the employee's area of work, the "servant's place in the hierarchy and the nature of his duties are other factors that must be taken into account, especially in order to assess the seriousness of the offence committed".[31] Of importance, as well, is the "time and place" in which public criticism occurs.[32] Finally, the "way in which the criticisms are formulated affects the seriousness of the offence", together with the presence or absence of "good faith" in making the criticism.[33] These considerations do not negate the "serious offence" of "failure to respect the obligation of restraint in political matters";[34] rather, they may serve to temper any sanction imposed on account of this offence.

In *Vachon*,[35] another Public Service Staff Relations Board decision, a probationary employee hired as an "education consultant" with the Family Planning Division, Department of National Health and Welfare, had appeared on a television show, in which he commented adversely on the Department's sex education programme and on certain practices adopted by the Department for the distribution of information. Although he appeared on the television show in his capacity as a private citizen, he was clearly identified as a Department employee in the Family Planning Division. Mr. Vachon had also made his opposition to departmental policies quite clear at his place of work.

Adjudicator Descôteaux stated that Mr. Vachon's conduct amounted to a "breach of his duties as a public servant".[36] "Moreover", Adjudicator Descôteaux ruled, "some of his criticisms constitute[d] without a doubt direct criticism of the policy or the official objectives of the Department; they [were] in direct conflict with the said policy or objectives and with Mr. Vachon's duties as well".[37] Adjudicator Descôteaux made it clear that it was quite permissible to hold private views in opposition to government policy and to express those views "at the proper time and place and in a judicious manner ... in the course of performing [one's] duties, *in so far as the interests of [the] employer allow*".[38]

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[31] *Ibid.*

[32] *Ibid.*

[33] *Ibid.*

[34] *Ibid.*, at 12.

[35] *Vachon and Treasury Board (Department of National Health and Welfare)*, unreported (July 30, 1977, P.S.S.R.B., Descôteaux).

[36] *Ibid.*, at 7.

[37] *Ibid.*

[38] *Ibid.* (emphasis added).

In *Domazet*,[39] a mid-level employee of the Department of Immigration had engaged in internal criticism of how the Department was implementing its mandate. Eventually, he sent to twenty-four members of the House of Commons and, shortly thereafter, to the press, a package of information containing inter-office memoranda, privileged reports, legal opinions, policy papers, and a wealth of detail about a number of individuals under investigation by the Department.

Adjudicator Norman found a violation of the oath of office and oath of secrecy, as well as a breach of several sections of Chapter 2 of the *Immigration Manual*. However, he buttressed his decision that the employer was justified in firing the employee by adopting, as did *Kroeker*, the aforementioned quote from Sir C.K. Allen concerning the duty of loyalty owed by a civil servant. Mr. Domazet's criticisms, which in themselves evidenced disloyalty, attracted more blameworthiness because of his disclosure of confidential information, an act that Adjudicator Norman also viewed, implicitly, as disloyal.

The preceding Public Service Staff Relations Board cases laid the groundwork for *Re Fraser and Public Service Staff Relations Board*.[40] At issue was the dismissal of a federal public servant for the public expression of views very critical of certain policies of the government. The relevant statute, the federal *Public Service Employment Act*,[41] did not set out principles governing the extent to which public employees could comment publicly about political issues. The *Fraser* decision thus represents the most authoritative delineation of the principles respecting the common law duty of loyalty, insofar as it relates to public criticism of government policy on the part of public servants, and may indicate generally the bounds of acceptable political comment. It must be emphasized that the *Fraser* case did not involve a consideration of the *Canadian Charter of Rights and Freedoms*,[42] which had not been proclaimed when the events in the case occurred.

Since the factual context of *Fraser* is important to an understanding of the decision, we shall quote at length from Chief Justice Dickson's summary:[43]

> On February 23, 1982, the appellant, Mr. Neil Fraser, was discharged from his job with the Department of Revenue Canada. Prior to his discharge, he had worked for the department for ten years. For the five years immediately preceding the discharge he had been group head of the Business Audit Division of the Kingston District Office. In this position he supervised four to six auditors and was responsible for selecting large corporations and similar undertakings and auditing their financial statements to determine whether an appropriate amount of taxes had been paid.

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[39] *Domazet and Treasury Board (Department of Manpower and Immigration)*, unreported (October 21, 1977, P.S.S.R.B., Norman).

[40] *Supra*, note 3.

[41] R.S.C. 1970, c. P-32.

[42] *Supra*, note 1.

[43] *Supra*, note 3, at 124-26.

On January 18, 1982 the Kingston Whig-Standard published a letter to the editor written by Mr. Fraser criticizing the government's policy on metric conversion, a major topic of national debate at that time. On January 25, 1982, Mr. Fraser attended a meeting of the Kingston City Council at which a motion was presented opposing the federal government's policy on metric conversion. The next day an article appeared in the Kingston Whig-Standard in which Mr. Fraser's views on mandatory metric conversion were briefly quoted. Beside the article was a photograph of Mr. Fraser holding a placard bearing the slogan: 'Your freedom to measure is a measure of your freedom.'

Mr. Fraser's supervisor, Mr. Bruce Lowe, Director of the Kingston District Office, decided that Mr. Fraser's activities warranted a disciplinary response. On January 29, 1982, Mr. Lowe suspended him for three days without pay for having 'exceeded the bounds of acceptable conduct of a public servant'. He was directed 'to refrain from any further public statements that criticize a Government department or agency, its officials, or its rules and regulations'.

Mr. Fraser was greatly concerned about the implications of this restraint on his freedom of speech. On February 1, 1982, he attended another meeting of the Kingston City Council and expressed these concerns. This time he criticized not only the government's metric conversion programme but also its intention to proceed with a constitutional *Canadian Charter of Rights and Freedoms*. Like its metric policy, the Government's policy concerning a *Canadian Charter of Rights and Freedoms* was a major, highly visible and divisive issue at that time.

On February 5, 1982, Mr. Fraser agreed to appear on an open-line radio talk show for a local Kingston radio station. He stated he would not discuss anything related to Revenue Canada but continued to voice his criticisms of the government's metric and *Charter* policies. Among other things, he compared Prime Minister Trudeau's manner of governing to that of the dictatorship in Poland.

On February 8, 1982, Mr. Fraser met twice with senior departmental staff who advised him that further disciplinary action would be taken if he did not cease his activities. In between these two meetings he appeared on an open-line television programme. At these meetings he was asked to refrain from further criticisms of government policy until the matter had been dealt with through normal grievance channels. Senior departmental staff promised to try and expedite the grievance process. Mr. Fraser was not receptive to this proposal. He maintained his position that any criticism he made of government policy, unrelated to the policies of his department, was consistent with his right to engage in free speech.

At the second meeting on February 8, 1982, Mr. Fraser was given a second suspension, this time for ten days. During the course of this suspension, from February 9th to 22nd, he made a number of local and national media appearances. He criticized, more broadly and more fervently than ever, the policies of the government. He continued his campaign against British approval of the government's constitutional proposals and against the government's alleged abuse of the democratic process. He tried to organize a national pamphlet and telegram campaign to protest these matters. He began to make vicious personal attacks against the Prime Minister and compared him and the Canadian government to the Nazi regime. He was working, by his own admission, eighteen hours a day in opposition to the government and its policies.

By letter dated February 22, 1982, Mr. Fraser was advised that as a

> consequence of the statements he had made to both local and national media he was being discharged from the Department of Revenue Canada, effective February 23, 1982.

Mr. Fraser brought a grievance before the Public Service Staff Relations Board alleging unjust suspension and discharge. The essence of his position was that, while "a public servant must exercise restraint in his public utterances where the statements made might involve the duties of his position or the programme of the department in which he works",[44] the statements in issue "were so remotely related to the duties and responsibilities of the position he occupied in Revenue Canada as not to constitute misconduct".[45] The adjudicator agreed that the first suspension was not justified, but upheld the second suspension and dismissal. He found that there was just cause for these disciplinary measures because Mr. Fraser's conduct "adversely affected his own ability to conduct the affairs of the department in which he worked".[46] More particularly, he concluded that the vehement public criticism by Mr. Fraser of his employer was "unlikely to instill confidence in a clientele that has a right to expect impartial and judicious treatment".[47]

Mr. Fraser then brought an application for judicial review under section 28 of the *Federal Court Act*,[48] alleging error of law on the part of the adjudicator. In his submission, two major errors were suggested: that dismissal on the basis of criticism unrelated to his work or to the functions of the Department in which he was employed was not supportable; and that there was an error in finding that Mr. Fraser's effectiveness as a civil servant had been impaired because of the public perception of his conduct, as no evidence to that effect was before the adjudicator.

The Federal Court of Appeal dismissed the application, finding that there was no error of law.[49] Without reviewing the details of the three judgments,[50] suffice it to state that the Court concluded that the decision below could be reasonably supported. It took the position that whether Mr. Fraser's behaviour could constitute misconduct was a question of fact, which was not reviewable on appeal. On appeal to the Supreme Court of Canada, Mr. Fraser renewed his allegation that the adjudicator had made two errors of law. Chief Justice Dickson, speaking for the full Court, dismissed the appeal.

The narrow question before the Court was whether the Federal Court of Appeal had concluded correctly that the adjudicator did not err in law in arriving at his decision to uphold the disciplinary actions. However, in considering the two errors of law alleged by the appellant, the Court referred to the principles governing public expression of views by public servants.

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[44] *Supra*, note 3, at 209.

[45] *Ibid*.

[46] *Ibid*., at 225.

[47] *Ibid*.

[48] R.S.C. 1970 (2d Supp.), c. 10.

[49] *Supra*, note 3.

[50] *Per* Thurlow C.J., Pratte, and Ryan JJ.

Chief Justice Dickson explained that the central issue was identifying "the proper legal balance between (i) the right of an individual, as a member of the Canadian democratic community, to speak freely and without inhibition on important public issues and (ii) the duty of an individual, *qua* federal public servant, to fulfil properly his or her functions as an employee of the Government of Canada".[51]

The Court stated that it agreed that the following principles, which it drew from the decision of the adjudicator, were applicable:[52]

> [A] public servant is required to exercise a degree of restraint in his or her actions relating to criticism of government policy, in order to ensure that the public service is perceived as impartial and effective in fulfilling its duties.... [T]he degree of restraint which must be exercised is relative to the position and visibility of the civil servant.

In the following passage, the nature of the necessary balancing, described above, was explained:[53]

> The act of balancing must start with the proposition that *some* speech by public servants concerning public issues is permitted. Public servants cannot be, to use Mr. Fraser's apt phrase, 'silent members of society'. I say this for three reasons.
>
> First, our democratic system is deeply rooted in, and thrives on, free and robust public discussion of public issues. As a general rule, all members of society should be permitted, indeed encouraged, to participate in that discussion.
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> Secondly, account must be taken of the growth in recent decades of the public sector — federal, provincial, municipal — as an employer. A blanket prohibition against all public discussion of all public issues by all public servants would, quite simply, deny fundamental democratic rights to far too many people.

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[51] *Supra*, note 3, at 124.

[52] *Ibid*., at 130. The Court drew these principles from the following passage:

> [It is] incumbent upon the public servant to exercise some restraint in the expression of his views in opposition to government policy. Underlying this notion is the legitimate concern that the public service and its servants should be seen to serve the public in the administration and implementation of government policies and programmes in an impartial and effective manner. Any individual upon assuming employment with the public service knows or ought to be deemed to know that in becoming a public servant he or she has undertaken an obligation to exercise restraint in what he or she says or does in opposition to government policy. Moreover, it is recognized that the exercise of such restraint may very well not be a requirement of employees who work in less visible sectors of Canadian society.

See the P.S.S.R.B. decision in *Re Fraser and Treasury Board (Department of National Revenue)*, *supra*, note 3, at 212-13.

[53] *Re Fraser and Public Service Staff Relations Board*, *supra*, note 3, at 131-32 (emphasis in original).

> Thirdly, common sense comes into play here. An absolute rule prohibiting all public participation and discussion by all public servants would prohibit activities which no sensible person in a democratic society would want to prohibit. Can anyone seriously contend that a municipal bus driver should not be able to attend a town council meeting to protest against a zoning decision having an impact on her residential street? Should not a provincial clerk be able to stand in a crowd on a Sunday afternoon and protest a provincial government decision cutting off funding for a day-care centre or a shelter for single mothers? And surely a federal commissionaire could speak out at a Legion meeting to protest against a perceived lack of federal support for war veterans. These examples, and many others could be advanced, demonstrate that an absolute prohibition against public servants criticizing government policies would not be sensible.
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> On the other side, however, it is equally obvious that free speech or expression is not an absolute, unqualified value. Other values must be weighed with it. Sometimes these other values supplement, and build on, the value of speech. But in other situations there is a collision. When that happens the value of speech may be cut back if the competing value is a powerful one. Thus, for example, we have laws dealing with libel and slander, sedition and blasphemy. We also have laws imposing restrictions on the press in the interests of, for example, ensuring a fair trial or protecting the privacy of minors or victims of sexual assaults.
>
> A similar type of balancing is required in the present appeal. Public servants have some freedom to criticize the government. But it is not an absolute freedom. To take but one example, whereas it is obvious that it would not be 'just cause' for a provincial government to dismiss a provincial clerk who stood in a crowd on a Sunday afternoon to protest provincial day-care policies, it is equally obvious that the same government would have 'just cause' to dismiss the Deputy Minister of Social Services who spoke vigorously against the same policies at the same rally.

The Court agreed with the adjudicator that, in the circumstances, the criticisms in issue were job-related, even though they did not relate specifically to responsibilities of Revenue Canada or to the particular duties of the appellant. This conclusion followed from its view that "[a] job in the public service has two dimensions, one relating to the employee's tasks and how he or she performs them, the other relating to the perception of a job held by the public".[54] The Court explained that, under a Parliamentary system of government, where the role of the executive is to administer and implement policy decided upon by the legislature, the public service must demonstrate impartiality, neutrality, fairness, and integrity. Particular emphasis was placed on the need for both actual and apparent impartiality.[55]

The Court explained that, in order to meet these standards, the public service must demand certain attributes of its personnel. After citing knowledge, fairness, and integrity, the Court suggested that a requirement of loyalty on the part of individuals was crucial to achieving impartiality in fact and appearance.

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[54] *Ibid.*, at 132.

[55] *Ibid.*, at 133.

Chief Justice Dickson discussed loyalty in the following terms:[56]

> As the Adjudicator indicated, a further characteristic is loyalty. As a general rule, federal public servants should be loyal to their employer, the Government of Canada. The loyalty owed is to the Government of Canada, not the political party in power at any one time. A public servant need not vote for the governing party. Nor need he or she publicly espouse its policies. And indeed, in some circumstances a public servant may actively and publicly express opposition to the policies of a government. This would be appropriate if, for example, the government were engaged in illegal acts, or if its policies jeopardized the life, health or safety of the public servant or others, or if the public servant's criticism had no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability. But, having stated these qualifications (and there may be others), it is my view that a public servant must not engage, as the appellant did in the present case, in sustained and highly visible attacks on major government policies. In conducting himself in this way the appellant, in my view, displayed a lack of loyalty to the government that was inconsistent with his duties as an employee of the government.
>
> As the adjudicator pointed out, there is a powerful reason for this general requirement of loyalty, namely, the public interest in both the actual, and apparent, impartiality of the public service.

With respect to the second alleged error in law — that the adjudicator had erred by finding, in the absence of evidence, that the appellant's effectiveness as a public servant had been impaired by his public criticism — the Court also found for the respondent. The adjudicator had found the appellant to have been impaired in his ability to perform his specific job, inferring that his statements had reduced the confidence of his clientele, and to have been impaired in a general sense, as a public servant, because of the special characteristics and requirements of that position. The Court held that, while, generally, direct evidence of impairment in relation to performance of a specific job is necessary, this is not an absolute requirement; in the proper circumstances, as in the instant case, such an inference could be drawn. With respect to impairment of ability in the wider sense, the Court held that direct evidence was not necessarily required, and that it was open to the adjudicator to infer impairment from the whole of the evidence.[57]

Mr. Fraser's dismissal was upheld, therefore, because his disloyalty, expressed in the manner adopted by him, was such that his "ability to perform his own job and his suitability to remain in the public service were both impaired".[58] The public could no longer repose trust in Mr. Fraser to fulfil his job as a revenue assessor in a skillful, dispassionate, and rational manner.

The duty of loyalty is seen, then, in essentially functional terms. Loyalty is necessary to the effective operation of the public service, and the effective operation of the public service is a constitutional imperative that legitimizes some limitation on the individual rights of public servants.[59]

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[56] *Ibid.*, at 133-34.

[57] *Ibid.*, at 134-37.

[58] *Ibid.*, at 136.

However, it must be reiterated that the Chief Justice did not hold that all criticism of government is inconsistent with the public servant's duty of loyalty. In the absence of statute, a public servant is free to engage in public criticism of the policies of the government-employer, except where the nature and extent of the criticism either impairs that servant's ability to discharge specific responsibilities effectively or impairs him or her generally as a public servant, in that the public servant may no longer be publicly perceived as impartial in the performance of assigned duties. Where the critical line between proper criticism and improper criticism is located would seem to depend on a variety of factors, such as the position and visibility of the public servant, the nature of the criticisms themselves, and whether they are related to the particular responsibilities of the civil servant or his or her department.

Before turning to discuss the common law duty of confidentiality, we wish to address the right of an employee, acting in his or her capacity as a union official, to engage in public criticism of government. There has been some jurisprudence, having its source in arbitral awards, on the question whether the principles governing public speech, and more particularly, public criticism of the employer, should be modified in the context of labour relations. Certain arbitral awards that have been given in the private sector suggest that union officials, acting in the discharge of their representative duties, enjoy a wider latitude in making public statements critical of management than do other employees.[60]

The issue has also been considered in several arbitral awards that have arisen under the federal *Public Service Staff Relations Act*. These awards indicate that the position is not entirely clear in the public sector. In *Re Stewart and Treasury Board (Department of Supply and Services)*,[61] the chief adjudicator took the view that, "[a]s part of the collective bargaining process, rank-and-file union members as well as their officers and negotiators have an unquestioned right to speak out freely and strongly *about their terms and conditions of employment*".[62] Indeed, he observed that they could denounce their employers in "unrestrained language",[63] especially during bargaining or a strike. However, he held that, in the context of government employment, employees were not entitled to make public statements critical of policies or programmes that bear no relation to issues respecting labour relations.[64]

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[59] *Ibid.*, at 134.

[60] See *Re Corporation of the City of London and London Civic Employees Union, Local 107* (1978), 19 L.A.C. (2d) 147 (Kruger), and *Re Burns Meats Ltd. and Canadian Food & Allied Workers, Local P139* (1980), 26 L.A.C. (2d) 379 (Picher).

[61] *Supra*, note 19. See, also, *Re Vaillancourt and Treasury Board (Department of Manpower and Immigration)*, *supra*, note 15, at 28-29, where the adjudicator suggested that union spokesmen could engage in public criticism of working conditions, but could not engage in public criticism of policies, programmes and services of the government. Since the grievors issued their statements in the mistaken belief that they had the authorization of their union, these comments were, strictly speaking, *obiter*.

[62] *Supra*, note 19, at 53 (emphasis in original).

In *Stewart*, the grievor was a union president, but the union was not the bargaining agent for the unit of which he was a member. An argument that his responsibility as union president entitled him to make the statements in issue was rejected. The chief adjudicator was of the view that union officials do not enjoy a special immunity if their statements go beyond permissible bounds of criticism applicable to all employees, that is, the terms and conditions of employment.[65]

The employee then referred certain questions of law and jurisdiction to the Public Service Staff Relations Board, which held that the chief adjudicator did not err in law or jurisdiction in his findings and conclusions.[66] The Board agreed that the public criticisms in question were inappropriate and "wholly inconsistent with the role of a public servant".[67] On the question whether a union official enjoys a special immunity, the Board was careful to restrict its conclusions to the case of a union official not engaged in union activities on a full-time basis. In its view, such an employee "may legitimately call attention to matters that have to do with conditions of employment",[68] but is not "entitled to attack publicly any Minister, deputy [head] or department in respect of matters remote from collective bargaining and closely associated with political controversy".[69]

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[63] *Ibid.*

[64] The chief adjudicator explained as follows (*ibid.*, at 70):

> As I said earlier, there is no doubt that employees entitled to bargain collectively are entitled to speak their minds about the subject-matter of their negotiations and to criticize the position taken by the employer's negotiators. It does not follow that they are entitled to attack publicly any Minister, deputy head or department in respect of matters remote from collective bargaining and closely associated with political controversy.

[65] That the union official has some higher right was categorically rejected (*ibid.*, at 65-66):

> The implication of such statements is that the grievor's status as union president can be divorced in some way from his status as an employee, that he has two distinct and unconnected capacities which in this context make him two different persons rather than one person. The distinction is not valid and must be recognized as a fiction in this context as well as in others.

[66] *Supra*, note 19.

[67] *Ibid.*, at 19, quoting the chief adjudicator, *supra*, note 19, at 64.

[68] *Supra*, note 19, at 21. The Board stated that it was not necessary to express its opinion "as to what principle should be applied to an employee on leave of absence engaged in full time activity on behalf of an employee organization".

[69] *Ibid.*, quoting *Re Stewart and Treasury Board (Department of Supply and Services)*, *supra*, note 19, at 70, which, however, referred to a "deputy head", misquoted by the Board as "deputy minister".

The Board's decision was challenged in the Federal Court of Appeal on an application for judicial review.[70] Jackett C.J., who delivered the decision of the Court, held that the chief adjudicator had not erred in law, and dismissed the application. He indicated that he agreed with the reasons given by the chief adjudicator and the Board. Jackett C.J. concluded that there was an adequate basis for a finding of misconduct. In the course of his reasons, he observed that the employee's public criticism of government policy had not occurred while he was acting on behalf of the union as a bargaining agent for the bargaining unit. Hence, the application did not require the Court to deal with an act that would be both "(a) *prima facie* misconduct as a public servant, and (b) conduct in the course of carrying out the public servant's duties as an officer of the union acting as bargaining agent".[71]

The precise meaning of the various *Stewart* decisions is not entirely clear. It would appear first, that all employees, including union officials, may engage in public criticism of their employers with respect to issues relating to their terms and conditions of employment and collective bargaining. Secondly, union officials who are not acting in the course of their official duties do not enjoy a special privilege or immunity that permits them to criticize their employer publicly with respect to matters outside that context. Thirdly, it was not decided whether a union official is entitled to make public statements concerning matters outside the terms and conditions of employment in the course of discharging his or her duties as an union official of a bargaining agent.

The third issue was addressed in two later decisions. In *Re Goyette and Guindon and Treasury Board (Unemployment Insurance Commission, Department of Manpower and Immigration)*,[72] the adjudicator considered the *Stewart* decisions to constitute a precedent establishing that a public servant who holds a union office enjoys an immunity only insofar as his or her public comments pertain to staff relations. The adjudicator upheld disciplinary measures taken against two public servants whose critical comments about government policy were made in their capacity as regional presidents of their union, on the ground that their criticisms concerned matters other than staff relations.

In *Re Chedore and Treasury Board (Post Office Department)*,[73] the grievor, while acting as president of a local of the Canadian Union of Postal Workers, made public statements to the press extremely critical of the local Postmaster and his management of the local Post Office. The arbitrator applied the principles enunciated by the adjudicator in *Stewart*. After finding that the employee's public criticisms were not related to the terms and conditions of employment and, therefore, were improper, the arbitrator turned to the argument that the grievor, by virtue of his status as president of the union local, was immune from discipline. While acknowledging that such an employee had special responsibilities, the arbitrator stated that "he does not have any special rights to criticize on any and every subject".[74] Union officials, in his view, were in a position no different from employees generally:

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[70] *Stewart v. Public Service Staff Relations Board, supra*, note 19.

[71] *Ibid.*, at 136.

[72] *Supra*, note 3.

[73] (1980), 29 L.A.C. (2d) 42 (P.S.S.R.B., MacLean).

> [T]here is nothing in the Act nor in the collective agreement which indicates that officers of Locals of this union are immune from discipline as a result of improper statements made to the press or in public. They are subject to the same types of discipline as they would be in any other department of the public service or as they would be in the private sector.

(iii) The Duty of Confidentiality

a. General

As we have said, an employee ordinarily owes a duty of confidentiality to his or her employer. While the employment relationship subsists, this duty may be seen as part of the more comprehensive duty of loyalty. The common law will impose a duty of confidentiality[75] both in the employment context, and elsewhere, where it can be shown that the information imparted is "confidential", that is, basically, where it is not common knowledge[76] or where it is rendered confidential either by the context in which it was disclosed to the confidant[77] or by its very nature.[78]

The common law will enforce this duty where the person who confides the information in question establishes that the information was given "in circumstances which imposed an obligation on the confidant to respect the confidentiality of the information" and that the disclosure was a breach of the duty.[79] A breach will be established where the confidant has used or disclosed the confidential information obtained from the confider in a manner inconsistent with the purpose for which it was given to him or her.[80] It would seem that liability arises even where the confidant has not acted deliberately or dishonestly.[81] In other words, a person is held strictly liable for a breach of his or her duty of confidentiality. The "public interest" in maintaining the sanctity of confidences arguably provides the basis for such liability and, as well, serves to justify many of those instances in which confidences may be said to be legitimately breached.[82]

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[74] *Ibid.*, at 61, citing with approval a supporting statement in *Re Stewart and Treasury Board (Department of Supply and Services)*, *supra*, note 19, at 65.

[75] See *supra*, note 2. The following discussion of the duty of confidentiality has been based, in large measure, on Gurry, *supra*, note 4.

[76] See Gurry, *ibid.*, at 70: "This attribute [inaccessibility] is fundamental to the action for breach of confidence for it is only through the communication of inaccessible information that a confidence is reposed by the confider in the confidant." However, the "law does not require information to be absolutely inaccessible before it can be characterized as confidential": *ibid.*, at 73. See, also, *ibid.*, at 245 *et seq.*, and *infra*, this ch., sec. 2(b)(iii)b.

[77] See Gurry, *supra*, note 4, at 78-81. Even information that is common knowledge can become confidential in this way.

[78] See *ibid.*, at 81-83, and *International Corona Resources Ltd. v. Lac Minerals Ltd.* (1986), 53 O.R. (2d) 737, at 771-72, 25 D.L.R (4th) 504 (on appeal to the Court of Appeal) (subsequent references are to 53 O.R. (2d)). See, also, Jones, "Restitution of Benefits Obtained in Breach of Another's Confidence" (1970), 86 Law Q. Rev. 463, at 466, where he lists the following factors to determine when information is confidential:

> (a) ...some degree of secrecy is essential before information can be deemed to be confidential;
>
> (b) ...confidential information need not be novel in the sense, for example, that it could be the subject of a successful patent application;
>
> (c) ...confidential information cannot embrace the ordinary skills which an individual may acquire in the ordinary course of his life; and
>
> (d) ...the courts will not impose an obligation of confidence upon a defendant when it would be illegal or contrary to public policy so to do.

In its focus on the disclosure of government information by Crown employees, the strictures of the common law duty of confidentiality parallel or complement those of the various oaths of secrecy,[83] statutory non-disclosure provisions,[84] the *Criminal Code*[85] and the *Official Secrets Act*.[86] Together, these facets of the law circumscribe the right of Crown employees to release government information to the public. The reasonableness of these restrictions will be examined in a later portion of this Report,[87] having regard to the public interest in the sanctity of confidences, the proper functioning of the public service, and the legitimate exposure of government wrongdoing.

Before we examine the law relating to the duty of confidentiality, brief reference should be made to the distinction between the operation of that duty in the private sector and the operation of that duty in respect of government information. Referring to *Attorney-General v. Jonathan Cape Ltd.*[88] and to *Commonwealth of Australia v. John Fairfax & Sons Ltd.*,[89] one commentator has said:[90]

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[79] See Gurry, *supra*, note 4, at 3-5, and *International Corona Resources Ltd. v. Lac Minerals Ltd.*, *supra*, note 78, at 771-72.

[80] See Gurry, *supra*, note 4, at 3-5.

[81] See *ibid.*, ch. XII, sec. B.

[82] See *infra*, this ch., sec. 2(b)(iii)d.

[83] See, for example, *Public Service Act*, R.S.O. 1980, c. 418, s. 10(1). See discussion *infra*, this ch., sec. 3(b)(i)a.(1).

[84] See discussion *infra*, this ch., sec. 3(b)(i)a.(2).

[85] R.S.C. 1970, c. C-34. See discussion *infra*, this ch., sec. 3(b)(ii)a.

[86] R.S.C. 1970, c. O-3. See discussion *infra*, this ch., sec. 3(b)(ii)b.

[87] See *infra*, ch. 6, sec. 7.

[88] [1976] Q.B. 752, [1975] 3 All E.R. 484 (subsequent reference is to [1976] Q.B.). See *infra*, this ch., sec. 2(b)(iii)d.

[89] (1981), 32 A.L.R. 485, 55 A.L.J.R. 45 (H.C.) (subsequent references are to 32 A.L.R.). See *infra*, this ch., sec. 2(b)(iii)d.

[90] Gurry, *supra*, note 4, at 103 (emphasis added).

> In each of those decisions ... it was held that the right to restrain the use of confidential government information is subject to different considerations from those which govern the right of an individual or firm to restrain the use of information which has been confidentially imparted. Whereas inaccessibility is the fundamental criterion which determines whether trade secrets and personal or artistic information are confidential, inaccessibility alone is an insufficient test for assessing whether government information should be protected as confidential. *In order to restrain the disclosure of government information, it must be shown not only that the information for which protection is sought is inaccessible, but also that it is in the public interest that such information remains inaccessible.*

For example, "the public interest will require that information be protected when disclosure of the information would obstruct the proper functioning of a recognized part of the constitutional machinery".[91]

We now turn to consider the general law relating to the duty of a person who receives information "in confidence", that is, where the information was imparted to the confidant, whether directly or indirectly, and whether expressly or impliedly, for a limited purpose, and not to be used for any other purpose.[92] Perhaps one of the most famous statements describing that duty appears in the case of *Seager v. Copydex Ltd.*[93] In that case, Lord Denning M.R. stated that "he who has received information in confidence shall not take unfair advantage of it".[94] As we have seen, "unfair advantage" could amount simply to the disclosure of the information in question. In particular, an employee has a duty not to use information obtained by virtue of his employment for his own purposes, contrary to the interests of his employer.[95] With few exceptions, such information has been imparted for a limited purpose and the employee "either *knew*, or *ought to have known*", of this fact.[96]

In some cases, the obligation is imposed expressly; in others, it arises by implication. For example, it may arise from the nature of the employment relationship in question. And, in yet other instances, as in the case of the majority of Ontario Crown employees, there may be several sources for the obligation. In such a case, at least in theory, it could hardly be argued that the information was not imparted for a limited purpose or that the employee did not understand this or was not warned at the outset that the information was confidential.[97]

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[91] *Ibid.*, at 106.

[92] We are assuming here a direct connection between the confider and the confidant. A third party may also be bound by a duty of confidentiality: see Gurry, *supra*, note 4, chs. XIII and XIV.

[93] *Seager v. Copydex Ltd.*, [1967] 1 W.L.R. 923, [1967] 2 All E.R. 415 (C.A.) (subsequent references are to [1967] 2 All E.R.).

[94] *Ibid.*, at 417.

[95] See *Robb v. Green*, *supra*, note 5; *Merryweather v. Moore*, [1892] 2 Ch. 518, 61 L.J. Ch. 505; *Kirchener & Co. v. Gruban*, [1909] 1 Ch. 413, 78 L.J. Ch. 117; *Amber Size and Chemical Co. v. Menzel*, [1913] 2 Ch. 239, 82 L.J. Ch. 573; *Alparton Rubber Co. v. Manning* (1917), 86 L.J. Ch. 377, 116 L.T. 499; *British Industrial Plastics, Ltd. v. Ferguson*, [1940] 1 All E.R. 479, 162 L.T. 313 (H.L.); *Bents Brewery Co. Ltd. v. Hogan*, [1945] 2 All E.R. 570 (K.B.); *Cranleigh Precision Engineering Ltd. v. Bryant*, [1965] 1 W.L.R. 1293, [1964] 3 All E.R. 289 (Q.B.) (subsequent reference is to [1965] 1 W.L.R.); *Initial Services Ltd. v. Putterill*, [1968] 1 Q.B. 396, [1967] 3 All E.R. 145 (C.A.) (subsequent references are to [1967] 3 All E.R.); *Sorbo Rubber Sponge Products v. Defries* (1930), 47 R.P.C. 454 (Ch.); and *Bee Chemicals Co. v. Plastics Paint and Finish Specialities Ltd.* (1979), 47 C.P.R. (2d) 133 (Ont. C.A.).

[96] See Gurry, *supra*, note 4, at 115 (emphasis in original).

The duty to preserve the confidentiality of information obtained *qua* employee is especially onerous during the period of employment. Indeed, since the duty may arise because of the particular position held by the employee and, therefore, because of the expectations held of the employee by the employer, the more senior the level of employment, the more readily the court will imply a duty of confidentiality and the stricter that duty will be.[98]

At times, however, an employee may be under an actual duty to disclose information evidencing wrongdoing on the part of the employer that ought to be disclosed in the public interest.[99] Section 11 of the proposed *Freedom of Information and Protection of Individual Privacy Act, 1986*,[100] for example, requires a government agency head to "disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public". In *Swain v. West (Butchers) Ltd.*,[101] the English Court of Appeal held that a contract of employment that imposed on the employee a duty to "do all in his power to promote, extend and develop the interests of the company" in his capacity as a general manager, entailed the positive obligation to inform the company's board of directors of any wrongdoing by fellow employees. However, the Court of Appeal took care to avoid any general statement of the law. Whether, and when, the positive duty to disclose wrongdoing arises "must depend upon the circumstances of each particular case".[102]

With regard to an employee not in a position of responsibility, where the principle of *uberimmae fidei*, or absolute candor, is not applicable, the general rule is that there is no positive duty to expose wrongdoing in the absence of a specific contractual provision. However, the situation may well be otherwise if the wrongdoing is of a very serious nature.[103] Moreover, if an employer conducts an investigation into alleged wrongdoing, an employee is bound to disclose all information relevant to the furtherance of that investigation, including the identity of wrongdoers.[104]

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[97] The fact that the "warning" arises by virtue of a non-common law source, such as an oath of secrecy or a statutory non-disclosure provision, is irrelevant. What is critical here is the simple fact that the employee knew, or ought to have known, of the confidential nature of the information.

[98] In *Tournier v. National Provincial and Union Bank of England*, [1924] 1 K.B. 461 (C.A.), at 474, Bankes L.J. acknowledged that professionals owe an implied obligation of confidence toward those who consult them, but added that the extent of the obligation depends on the particular nature and circumstances of the professional-client relationship. See, also, Gurry, *supra*, note 4, at 120, and *Faccenda Chicken Ltd. v. Fowler*, *supra*, note 4, at 526.

[99] Usually, however, the duty requires that the matter be raised first internally so that an internal resolution of the problem might occur: see *infra*, this ch., sec. 2(b)(iii)c.

[100] Bill 34, 1986 (33d Leg. 2d Sess.).

[101] [1936] 3 All E.R. 261 (C.A.).

[102] *Ibid.*, at 264.

An employee's obligation of confidentiality does not cease with the termination of the employment contract; the obligation subsists, though usually to a lesser degree, after the end of the employment relationship.[105] At this point, however, the duty does not preclude a person from using his "ordinary acquired knowledge and experience".[106] As well, the duty may be ended by express or implied agreement or consent, or where the hitherto confidential information becomes public knowledge.[107]

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[103] In the Manitoba labour arbitration case of *Re Motor Coach Industries Ltd. and International Association of Machinists, Lodge 1953* (1981), 29 L.A.C. (2d) 438 (Freedman), Arbitrator Freedman suggested that a failure to report serious wrongdoing by one's fellow employees may be a breach of the obligations of loyalty, honesty, and good faith. But Arbitrator Freedman was careful to qualify his remarks with the observation that the circumstances of each individual case must govern (see *ibid.*, at 446-48).

In the *Motor Coach Industries* case, the misconduct was of a very minor nature. A low-level employee had not revealed to management that a foreman had made a slight alteration to her time card in her favour. Her connivance at this was held to be insufficient to justify the disciplinary action imposed, or indeed any disciplinary action, in view of the trifling nature of the wrongdoing (from her perspective) and the natural reluctance of a low-level employee to bring such a matter to the attention of her superiors. By contrast, in *Re United Steelworkers, Local 3129 and Moffats Ltd.* (1966), 17 L.A.C. 72 (Arrell), and in *Division No. 113, Amalgamated Association of Street Electric and Motor Coach Employees of America in re Toronto Transportation Commission* (1951), 2 L.A.C. 673 (Lane), the view was advanced that an employer would be justified in disciplining an employee who had knowledge of acts of theft by fellow employees, but failed to apprise management of the situation. This view has, however, not gone unchallenged: *Re District of Coquitlan and Canadian Union of Public Employees, Local 386* (1977), 14 L.A.C. (2d) 263 (Larson), and *Re Air Canada and International Association of Machinists and Aerospace Workers* (1976), 24 L.A.C. (2d) 373 (Arthurs). The concern is that to impose such a duty on employees may relieve the employer of the normal burden of proving substantial misconduct.

[104] *Re International Woodworkers of America, Local 1-118 and Sooke Forest Products Ltd.* (1968), 68 D.L.R. (2d) 432 (B.C.S.C.), aff'd (1968), 1 D.L.R. (3d) 622 (B.C.C.A.).

[105] See *Robb v. Green, supra*, note 5; *Morison v. Moat* (1851), 9 Hare 241, 68 E.R. 492; *Cranleigh Precision Engineering Ltd. v. Bryant, supra*, note 95; *Faccenda Chicken Ltd. v. Fowler, supra*, note 4; and Gurry, *supra*, note 4, at 178-79.

In regard to the protection of confidential information generally, see *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.*, [1963] 3 All E.R. 413, 65 R.P.C. 203 (C.A.) (subsequent references are to [1963] 3 All E.R.).

[106] See Gurry, *supra*, note 4, at 68.

[107] See *ibid.*, ch. XI.

Moreover, it has been suggested that not all employees may be bound by a duty of confidentiality.[108] Where there is no contractual provision imposing a duty, and where the employee's responsibilities do not involve the handling of, or access to, confidential information, or where the employee has not been told to keep the information secret, there may be no duty of confidentiality.[109] But the issue is controversial. Yet other cases have held that the mere existence of an employment relationship suffices to give rise to the duty.[110]

In any event, an employer will ordinarily have recourse to the broader duty of loyalty where no duty of confidentiality is said to arise. The duty of loyalty demands that an employee not disclose or use confidential information so as to harm his or her employer.

In *Coco v. A.N. Clark (Engineers) Ltd.*,[111] Megarry J. suggested that a "reasonable man" test was appropriate to determine whether a duty of confidentiality had arisen in respect of the disclosure of information:[112]

> From the authorities cited to me, I have not been able to derive any very precise idea of what test is to be applied in determining whether the circumstances import an obligation of confidence. In the *Argyll* case[113] at page 330, Ungoed-Thomas, J. concluded his discussion of the circumstances in which the publication of marital communications should be restrained as being confidential by saying, 'If this was a well-developed jurisdiction doubtless there would be guides and tests to aid in exercising it.' In the absence of such guides or tests he then in effect concluded that part of the communications there in question would on any reasonable test emerge as confidential. It may be that that hard-worked creature, the reasonable man, may be pressed into service once more; for I do not see why he should not labour in equity as well as at law. It seems to me that if the circumstances are such that any

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[108] See *ibid.*, at 180.

[109] Gurry has noted that, "[i]n several employment cases, the fact that an employee has not been warned at the commencement of or during his employment that he must maintain the confidentiality of information which is disclosed to him, and the fact that the information is freely available to all employees, regardless of their responsibilities, have been decisive in establishing that the employee was not fixed with any obligation of confidence": *ibid.*, at 118. See, for example, *Faccenda Chicken Ltd. v. Fowler*, *supra*, note 4.

[110] This view has been accepted by Gurry in respect of a subsisting employment relationship: see *supra*, note 4, at 181-82.

[111] [1969] R.P.C. 41 (Ch.).

[112] *Ibid.*, at 48. It should be noted, however, that in the actual circumstances of *Coco's* case, Megarry J. stated that as he "would imply a term if there were a contract ... *a fortiori*, [he would] imply the equitable obligation" (at 51). He proceeded to add that it was "fortunately ... unnecessary for [him] to attempt to resolve the degrees of less compelling circumstances which would suffice to establish that obligation" (*ibid.*). Consequently, it would appear that the "reasonable man" test, a test that would be applicable, on its face, to cases of less compelling circumstances, was *obiter*. This is the opinion of the English Law Commission: The Law Commission, *Breach of Confidence* (Law Com. No. 110, Cmnd. 8388, 1981) (hereinafter referred to as "Law Commission Report"), para. 4.4, at 101. See Gurry, *supra*, note 4, at 119-20.

[113] *Duchess of Argyll v. Duke of Argyll*, [1967] Ch. 302.

> reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence. In particular, where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture[114] or the manufacture of articles by one party for the other, I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence.

In the relatively recent case of *Thomas Marshall (Exports) Ltd. v. Guinle*,[115] in a possible effort to limit the application of the "reasonable man" test proposed in *Coco*, Megarry V.-C. suggested four standards by which to determine whether information is confidential and, therefore, whether a person is subject to the duty of confidentiality where the duty does not arise by contract or by virtue of the particular employment relationship. The four standards, modified here to fit the employment context, are as follows:[116] (1) the employer must believe that the release of the information would be injurious to him or advantageous to his rivals; (2) the employer must believe the information to be confidential; (3) these beliefs must be objectively reasonable; and (4) the confidentiality of the material must be apparent[117] in the context of the employer's particular industry or trade. If these four standards are met, the employee will be restrained by injunction from publishing or using the confidential information without the employer's authorization. In such situations, third parties to whom the disclosures are made by an employee in breach of his duty may also be restrained.[118]

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[114] For a recent Ontario Supreme Court decision finding a duty of confidentiality coexistent with a fiduciary obligation between two mining companies intending to engage in a joint venture, see *International Corona Resources Ltd. v. Lac Minerals Ltd.*, *supra*, note 78.

Corona Resources had sought to undertake a joint venture with the more senior mining company of Lac Minerals to develop gold claims. In the course of negotiations, Corona disclosed to Lac Minerals what Corona believed, and the Court later found to be, confidential geological information. Based on the favourable data received, Lac Minerals purchased property abutting the Corona claims, outbidding Corona's agent. Both parties had recognized the importance of this property to the commercial development of the gold deposits.

Mr. Justice Holland, having noted that this case raised "very interesting issues of fiduciary obligations and confidential information" (at 740), found Lac Minerals to be in breach of its duty of confidentiality and its fiduciary obligation to Corona as an intended joint venturer.

Having found no contractual basis to establish a partnership between the two companies, His Lordship found, by reference to the following three tests, that a breach of confidentiality had occurred (at 771-72):

> In the first place, the information must have the necessary quality of confidence about it [citing *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.*, *supra*, note 105].... In the second place, the plaintiff must establish that the information was communicated in circumstances in which an obligation of confidence arises [citing *Coco*, *supra*, note 111].... In the third place, in a case such as this, the plaintiff must establish an unauthorized use of the information to the detriment of the plaintiff [citing *Coco*].

The case is significant as a recent endorsement, by the Supreme Court of Ontario, of the leading British case law in the area of breach of confidence.

[115] [1978] I.C.R. 905 (Ch.).

[116] *Ibid.*, at 926.

[117] Note that in *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.*, *supra*, note 105, the leading modern case in the area of confidential business information and

It seems safe to say that the jurisprudence in regard to the basis of the duty of confidentiality has shifted substantially throughout the 18th and 19th centuries.[119] In the 18th century, a somewhat unsatisfactory line of cases developed protecting confidentiality on a property basis.[120] However, this narrow basis was not sufficient to protect the interests at stake. For example, where copyright was relied upon, what was protected was not the information *per se*, but the particular form in which it was conveyed.

In the 19th century, courts relied increasingly on the notion of implied contractual terms to protect confidences.[121] In *Kirchener & Co. v. Gruban*,[122] Eve J. appeared to go further than simply asserting that contract provided one basis for an invocation of the duty of confidentiality. He held, incorrectly, that

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manufacturing processes, the Court stated that it must look at the information itself, apart from the circumstances under which it was communicated, to determine whether it has the "necessary quality of confidence about it[.] [N]amely, ... [the information] must not be something which is public property and public knowledge" (*per* Lord Greene M.R., at 415). In *Schering Chemicals Ltd. v. Falkman Ltd.*, [1981] 2 W.L.R. 848, [1981] 1 All E.R. 321 (C.A.) (subsequent references are to [1981] 2 W.L.R.), Lord Shaw found the defendant liable for the disclosure of confidential information quite apart from any possible contractual basis on which to rest liability. As His Lordship stated (at 869):

> [T]he communication in a commercial context of information which at the time is regarded by the giver and recognized by the recipient as confidential, and the nature of which has a material connection with the commercial interests of the party confiding that information, imposes on the recipient a fiduciary obligation to maintain that confidence thereafter unless the giver gives consent to relax it.

[118] This restraint may be applied even to third parties who were unaware that the employee had been in breach of his duty of confidentiality. See, generally, *Schering Chemicals Ltd. v. Falkman Ltd.*, *supra*, note 117; *Printers & Finishers Ltd. v. Holloway*, [1965] 1 W.L.R. 1, [1964] 3 All E.R. 54 (Ch.); *Cranleigh Precision Engineering Ltd. v. Bryant*, *supra*, note 95; *Prince Albert v. Strange* (1849), 1 Mac. & G. 25, 41 E.R. 1171 (Ch.); *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.*, *supra*, note 105; and *Duchess of Argyll v. Duke of Argyll*, *supra*, note 113.

[119] See *Tipping v. Clarke* (1847), 8 L.T.O.S. 554; *Prince Albert v. Strange*, *supra*, note 118, at 44 and 45; *Morison v. Moat*, *supra*, note 105; *Pollard v. Photographic Co.* (1888), 40 Ch. D. 345, 58 L.J. Ch. 251; *Merryweather v. Moore*, *supra*, note 95; *Lamb v. Evans*, [1893] 1 Ch. 218, 62 L.J. Ch. 404 (C.A.); *Robb v. Green*, *supra*, note 5; and *Kirchener & Co. v. Gruban*, *supra*, note 95.

[120] See, for example, *Prince Albert v. Strange*, *supra*, note 118, and *The Exchange Telegraph Company (Ltd.) v. Howard and the London and Manchester Press Agency (Ltd.)* (1906), 22 T.L.R. 375. See, generally, Gurry, *supra*, note 4, at 46-56, and Jones, *supra*, note 78, at 464-65.

[121] See, generally, Gurry, *supra*, note 4, at 28-36, and Jones, *supra*, note 78, at 465-66.

[122] *Supra*, note 95.

Robb v. Green[123] had established that the duty rested solely in contract, whether express or implied. This narrow view has now been clearly repudiated.[124]

Other earlier cases illustrate an eclectic approach to determining the legal basis for restraining the disclosure of information. Some courts held that relief could be granted on the basis of "breach of trust, confidence, or contract".[125] In *Robb v. Green*,[126] for example, the Court stated that the action was supportable either as a breach of trust or as a breach of contract.[127]

Even in the 19th century, the courts noted that the precise nature of the basis of the remedy had not always troubled the judiciary. In *Morison v. Moat*, Turner V.-C. stated:[128]

> In some cases it [the jurisdiction of the court] has been referred to property, in others to contract, and in others, again, it has been treated as founded upon trust or confidence, meaning, as I conceive, that the Court fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces against a party to whom a benefit is given the obligation of performing a promise on the faith of which the benefit has been conferred; but, upon whatever grounds jurisdiction is founded, the authorities leave no doubt as to the exercise of it.

The jurisprudence remains unclear today.[129] As noted by one commentator:[130]

> A cursory study of the cases, where the plaintiff's confidence has been breached, reveals great conceptual confusion. Property, contract, bailment, trust, fiduciary relationship, good faith, unjust enrichment, have all been claimed, at one time or another, as the basis of judicial intervention. Indeed some judges have indiscriminately intermingled all these concepts. The result is that the answer to many fundamental questions remains speculative.

Perhaps, having regard to this welter of case law, it can be said that the only modern unifying principle governing the duty of confidentiality may be a general — indeed, rather amorphous — one, often described as equitable,[131] particularly in light of the repudiation of the notion that the basis of the duty is purely contractual. In *Seager v. Copydex Ltd.*,[132] Lord Denning M.R. held that a person who possesses confidential information, received in circumstances of confidence is, quite apart from any contract, under an obligation binding in conscience.[133] Another commentator has formulated his view of the essential basis of the court's jurisdiction in this way:[134]

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[123] *Supra*, note 5.

[124] See *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.*, *supra*, note 105, and its progeny: *Cranleigh Engineering Co. Ltd. v. Bryant*, *supra*, note 95, at 1317-19, and *Seager v. Copydex Ltd.*, *supra*, note 93, at 417.

[125] *Prince Albert v. Strange*, *supra*, note 118. See, also, *Morison v. Moat*, *supra*, note 105, and *Lamb v. Evans*, *supra*, note 119.

[126] *Supra*, note 5.

[127] *Ibid.*, at 319.

[128] *Supra*, note 105, at 255.

[129] Indeed, in England, the Law Commission has called for a statutory formulation of the duty and the action for breach of confidence: Law Commission Report, *supra*, note 112, para. 1.4, at 83.

[130] Jones, *supra*, note 78, at 463. See Gurry, *supra*, note 4, at 25: "The jurisdictional basis of the action for breach of confidence has been a source of lingering uncertainty and controversy."

> [The policy of the law,] it has been observed, is to enforce confidences created by the communication of confidential information. Underlying all of the cases in which the courts have granted relief is a broad notion of confidence reposed by one party in another which the courts will enforce. Once this policy is brought to mind, it is possible to regard the jurisdictional sources on which the courts rely as merely secondary mechanisms which provide the means by which the courts can enforce a confidence.
>
> The courts' attitude to jurisdictional sources has thus been a pragmatic one. Their principal concern has been, not to classify the breach of confidence action into an existing conceptual category, but to use existing categories to enforce the more fundamental notion of confidence....
>
> The action should properly be regarded, therefore, as *sui generis*, and attempts to confine it exclusively within one conventional jurisdictional category should be resisted. The present approach has the advantage of flexibility, giving the courts freedom to respond to the different social circumstances in which a confidence may arise, and it would be unwise to sacrifice this for conceptual neatness.

On this basis, the courts are able to employ the appropriate remedy, whether damages or injunctive relief, having regard to all the circumstances of each case.[135] Indeed, they have invoked their equitable jurisdiction in order to extend the duration of a duty of confidentiality even beyond the period provided for by an express contractual term.[136]

b. The "Public Domain" Exception to the Common Law Duty

While the duty to keep certain information confidential is an important cornerstone of employment law, it is not immutable. Over the years, several exceptions to the general rule have developed, the two most significant being the "public domain" exception and the "whistleblowing" exception. It is to these, and some less important, exceptions that we now turn.

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[131] See Gurry, *supra*, note 4, at 36-46, for developments at equity.

[132] *Supra*, note 93.

[133] Jones, *supra*, note 78, at 466, spoke of "a broad equitable principle of good faith" and then quoted Denning M.R.'s statement in *Seager*, *supra*, note 93, at 417, reproduced in the text accompanying note 94, *supra*.

[134] Gurry, *supra*, note 4, at 26. See, also, *ibid.*, at 58-61, where the author speaks of the courts' pragmatism and flexibility in this area.

[135] *Ibid.*, at 46.

[136] *Ibid.*, at 253-54. Unless, of course, the contract clearly excludes this possibility.

With respect to the "public domain" exception, the general principle is that no duty of confidentiality can exist in regard to information publicly known, or in the "public domain",[137] in the absence of an express contractual provision to the contrary[138] or explicit instructions from one's employer to treat the information as confidential.[139]

Various tests have been applied to determine whether information is truly in the public domain. For example, the case law has spoken of information that is "public property and public knowledge"[140] or "disclos[ed] ... to the world".[141] In *Schering Chemicals Ltd. v. Falkman Ltd.*,[142] the Court added a significant gloss to the previous jurisprudence.

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[137] See *Woodward v. Hutchins*, [1977] 1 W.L.R. 760, [1977] 2 All E.R. 751 (C.A.) (subsequent references are to [1977] 2 All E.R.). The "public domain" exception to the duty of confidentiality traces its origins to *James v. James* (1872), 41 L.J. Ch. 353, 26 L.T. 568, and *Reuter's Telegram Co. v. Byron* (1874), 43 L.J. Ch. 661. See Gurry, *supra*, note 4, at 65: "If the information is common knowledge, then the confider cannot be said to have placed any special faith in the confidant as the result of the communication." See, also, *ibid.*, at 70 *et seq.* and 245 *et seq.*, and Jones, *supra*, note 78, at 466 *et seq.*

[138] See Law Commission Report, *supra*, note 112, para. 4.15, at 107, *n.* 140, and para. 4.21, at 110-11, where the Law Commission stated that "there is no doubt that a contract can provide for information to be kept confidential by one or both of the parties, whether or not that information is in or comes in the public domain". Therefore, even when certain information is widely known but a party is still under a contractual duty not to disclose it, to speak of a "duty of confidentiality" in regard to that information is appropriate, and indeed legally correct. But this duty stands in contrast to the one that equity would impose since equity would require that the information have the "necessary quality of confidence about it": *Saltman Engineering*, *supra*, note 105. This contractual undertaking may, of course, be limited, as the Law Commission observed, by considerations of public policy (for example, restraint of trade considerations). The "necessary quality of confidence" is, insofar as the information may be said to be in the public domain but not widely known, "a matter of degree, depending on the particular case .... [I]f relative secrecy remains, the plaintiff can still succeed": *Franchi v. Franchi*, [1967] R.P.C.149 (Ch.), at 153. See Gurry, *supra*, note 4, at 70-76.

[139] It is the duty of an employee to obey all lawful, employment-related instructions given by the employer and to serve the employer faithfully. Wilful disobedience of lawful instructions will justify dismissal without notice: *Walker v. Booth Fisheries Can. Co.* (1922), 21 O.W.N. 395 (Div. Ct.); *Blake v. Kirkpatrick* (1881), 6 O.A.R. 212; and *Charlton v. B.C. Sugar Refining Co.*, [1925] 1 W.W.R. 546 (B.C.C.A.), aff'd, unreported (February 12, 1925, S.C.C.).

[140] *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.*, *supra*, note 105, at 415.

[141] *O. Mustad & Son v. Dosen*, [1964] 1 W.L.R. 109, at 111, [1963] 3 All E.R. 416, at 418 (H.L.).

[142] *Supra*, note 117.

Schering was a manufacturer of the pregnancy-test drug "primodos", which was later linked to birth defects. In an effort to deal with adverse publicity, Schering hired a consulting firm, Falkman Ltd., to instruct management on how to deal with the media, and this firm in turn engaged a Mr. Elstein to work with the company executives in presenting their side of the story to the press. Mr. Elstein later collaborated with Thames Television to produce a documentary entitled the "Primodos Affair". The company, after a pre-release screening of the film, sought an injunction to block its public airing.

The English Court of Appeal, in a 2-1 decision, granted an interlocutory injunction on the ground that Elstein had breached his duty of confidentiality in light of the trust and confidence reposed in him by Schering Chemicals Ltd., quite apart from any contractual basis on which to support the company's action. The Court granted the injunction even though Elstein was no longer employed on Schering's behalf and, significantly, even though he had not used any information that was not otherwise available to the public. The fact that the information was, in this sense, in the "public domain" did not vitiate the duty of confidentiality in regard to information that the recipient supposedly recognized at the time as confidential and that had, according to the Court, a "material connection with the commercial interests of the party confiding that information".[143] These factors "impose[d] on the recipient a fiduciary obligation to maintain that confidence thereafter unless the giver [gave] consent to relax it".[144]

Accordingly, if sensitive information entrusted to another party is used to harm the entrusting party, even where the information is in the public domain, a strict duty of confidentiality in regard to that information will be imposed if, at the time the information was entrusted, both parties recognized its confidential nature.

Lord Denning M.R. dissented. Although he acknowledged that Elstein was under a general duty of confidentiality toward Schering, he was of the view that this duty did not embrace information that was freely accessible, and actually obtained in the public domain.[145] Weighing the public interests at stake, the Master of the Rolls said:[146]

> The *public* interest in the drug Primodos and its effects far outweigh the *private*

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[143] *Ibid.*, at 869.

[144] *Ibid.*

[145] *Ibid.*, at 855, 858, and 859. See, also, *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.*, *supra*, note 105. In that case, Lord Greene M.R. stated that a document may be impressed with a duty of confidentiality notwithstanding the fact that the document consists entirely of information in the public domain. What makes the document subject to a duty of confidentiality is the work its creator has exerted to arrange and present the information, the using of "his brain" to produce a document "which can only be produced by somebody who has gone through the same process" (*ibid.*, at 415).

[146] *Supra*, note 117, at 865 (emphasis in original).

> interest of the makers in preventing discussion of it. Especially when all the information in the film is in the public domain, and where there has already been considerable coverage in newspapers and on television ....

The English Law Commission termed the decision "unfortunate".[147]

Another noteworthy case in regard to the public domain exception is *Woodward v. Hutchins*.[148] The plaintiffs, who were well known entertainers, obtained an interim injunction against their former press agent, his company, and his publishers, the "Daily Mirror", to restrain them from "disclosing, divulging or making use of or from writing, printing, publishing, or circulating any confidential information acquired during the course of employment with the plaintiffs or any of them relating to the private lives, personal affairs or private conduct of the plaintiffs or any of them". Lord Denning M.R., who discharged the injunction, noted that it was framed too widely, since it would catch information that was clearly in the public domain.[149] Moreover, implicit in the judgment was that the injunction unfairly restricted certain parties from discussing or relating what other parties had witnessed and were under no duty to keep confidential.

c. *The "Whistleblowing" Exception to the Common Law Duty*

An employee's breach of the common law duty of confidentiality[150] may be excused where the employee releases to the proper authorities, or to the public, information that evidences wrongdoing by the employer that ought, in the public interest, to be disclosed. The nature and extent of the wrongdoing that will give rise to this important, although limited, exception to the common law duty have been the subject of judicial discussion and development since the 19th century. In *Gartside v. Outram*,[151] the *locus classicus* of modern whistleblowing law, Sir William Page-Wood V.-C. enunciated the general principle that there exists "no confidence as to the disclosure of iniquity".[152] This proposition was in keeping with the observation by counsel for the plaintiff in *Annesley v.*

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[147] Law Commission Report, *supra*, note 112, para. 6.67, at 212. The Commission was prepared to acknowledge, however, that the *Schering* result could be obtained by contractual arrangements between the parties, if not contrary to public policy (*ibid.*).

[148] *Supra*, note 137. Note, however, that this case was pre-*Schering* and now stands somewhat in opposition to it to the extent that *Schering* has lessened the effect of the "public domain" in negating a duty of confidentiality.

[149] *Ibid.*, at 764.

[150] And of the common law duty of loyalty as well: see the statement of Chief Justice Dickson in the Supreme Court of Canada decision in *Re Fraser and Public Service Staff Relations Board*, *supra*, note 3, at 133-34, reproduced in the text following note 56, *supra*.

[151] (1856), 26 L.J. Ch. 113, 28 L.T.O.S. 120 (subsequent reference is to 26 L.J. Ch.). According to the Law Commission, this case "has in recent times become of increasing importance" (*supra*, note 112, para. 3.5, at 93).

[152] *Supra*, note 151, at 114. By "iniquity", Sir William Page-Wood V.-C. meant fraud or crime. The full passage reads as follows:

Earl of Anglesea[153] that "no private obligations can dispense with that universal one which lies on every member of society to discover every design which may be formed, contrary to the laws of society, to destroy the public welfare".[154]

With the passage of time, the nature of the wrongdoing justifying a whistleblowing exception to the common law duty has expanded, although with some lack of clarity, to include more than criminal conduct. One of the widest statements respecting the exception occurred in the English Court of Appeal case of *Initial Services Ltd. v. Putterill*.[155] According to Lord Denning M.R., who cited the *Annesley* case, an employee is free to disclose "any misconduct [committed or planned] of such a nature that it ought in the public interest to be disclosed to others".[156] He later referred to the extension of the defence to "crimes, frauds and misdeeds".[157] In *Fraser v. Evans*,[158] Lord Denning M.R. reaffirmed this wide formulation of the exception. In that case, the Master of the Rolls, by way of *obiter dicta*, expanded the *Gartside v. Outram* rule by saying:[159]

> The equity upon which the bill [action for breach of confidence] is founded is a perfectly plain and simple one, recognized by a number of authorities and most salutary to be enforced, by which any person standing in the confidential relation of a clerk or servant is prohibited, subject to certain exceptions, from disclosing any part of the transactions of which he thus acquires knowledge. But there are exceptions to this confidence, or perhaps, rather only nominally, and not really exceptions. The true doctrine is, that there is no confidence as to the disclosure of iniquity. You cannot make me the confidant of a crime or a fraud, and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part: such a confidence cannot exist.

It should be noted here that, in some cases, it may be said that the defence operates "to annihilate any obligations of confidence which might otherwise have existed". That is why Sir Page-Wood V.-C. said that "no confidence" arises in the circumstances. However, in other cases the defence may "apply to situations where the confidence might still exist, but the breach was justified on the grounds of a reasonable suspicion that the confidence related to an iniquity even though the suspicion turns out to be unfounded". See Gurry, *supra*, note 4, at 325 *et seq.*, esp. at 327.

With respect to the disclosure of crime, see *Tournier v. National Provincial and Union Bank of England*, *supra*, note 98, and *Khashoggi v. Smith* (1980), 124 Sol. Jo. 149 (C.A.).

[153] (1743), 17 State Tr. 1139 (Ex. Ir.).

[154] *Ibid.*, at 1229. This observation was approved, in substance, by the Lord Chief Baron and by Baron Mounteney, at 1239-44, and quoted with approval by Lord Denning M.R. in *Initial Services Ltd. v. Putterill*, *supra*, note 95, at 148.

[155] *Supra*, note 95. This case was approved in *British Steel Corp. v. Granada Television Ltd.*, [1980] 3 W.L.R. 774, [1981] 1 All E.R. 417, at 455 and 479-80 (H.L.) (subsequent reference is to [1981] 1 All E.R.).

[156] *Supra*, note 95, at 148.

[157] *Ibid.*

[158] [1969] 1 Q.B. 344, [1969] 1 All E.R. 8 (C.A.) (subsequent references are to [1969] 1 All E.R.).

[159] *Ibid.*, at 11.

> I do not look upon the word 'iniquity' as expressing a principle. It is merely an instance of just cause or excuse for breaking confidence. There are some things which may be required to be disclosed in the public interest, in which event no confidence can be prayed in aid to keep them secret.

As one commentator has pointed out, "[t]he difficulty with this statement is to give content to the words 'some things' ".[160] He suggested that the only category that is supported by "solid authority" is conduct medically dangerous to the public,[161] although some authority does exist in respect of conduct misleading to the public and cases where something detrimental to the community, not arising from wrongdoing, may take place.[162]

It bears emphasizing, however, that the judicial expansion of the whistleblowing exception, founded on the notion that there is a "public interest" in disclosure, appears to have alarmed some courts. The elasticity of the "public interest" principle has undoubtedly prompted this concern. In cases such as *Church of Scientology of California v. Kaufman*[163] and *Schering Chemicals Ltd. v. Falkman Ltd.*,[164] there are *dicta* to the effect that the exception should be restricted to instances of wrongdoing of grave public importance.

Moreover, while the defence would appear to apply to past, as well as contemplated, crimes, the matter is less certain where past civil wrongs are involved. Some cases, such as *Weld-Blundell v. Stephens*,[165] have doubted the applicability of the public interest defence in the latter situation. In the *Schering Chemicals Ltd.* case and *The Distillers Co. (Biochemicals) Ltd. v. Times Newspapers Ltd.*,[166] the defence was held to be inapplicable where the danger had completely passed. However, as we have seen, in the *Initial Services Ltd.* case, Lord Denning M.R. did not accept this principle; indeed, he expressly refused to view the *Weld-Blundell* case as authority for the proposition that the defence can *never* apply to a past civil wrong. Of course, the disclosure must be in the "public interest".[167] In this connection, it has been stated:[168]

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[160] Gurry, *supra*, note 4, at 335.

[161] See *Hubbard v. Vosper*, [1972] 2 Q.B. 84, [1972] 1 All E.R. 1023 (C.A.), and *Church of Scientology of California v. Kaufman*, [1973] R.P.C. 635 (Ch.). But see *infra* for a discussion of past civil wrongs.

[162] See Gurry, *supra*, note 4, at 338-41. The former type of conduct is considered *infra*, this ch., sec. 2(b)(iii)c.

[163] *Supra*, note 161, at 649.

[164] *Supra*, note 117, at 869.

[165] [1919] 1 K.B. 520 (H.L.).

[166] [1975] 1 All E.R. 41 (Q.B.).

[167] Gurry stated, therefore, that "the decision [in *Weld-Blundell*] can be confined to its facts, and to the special circumstances attending a libel, where to disclose the libel might increase the injury done to the person defamed by bringing to his attention his damaged reputation": *supra*, note 4, at 333.

[168] *Ibid.*, at 334.

> Therefore, it seems that the defence of just cause or excuse is potentially applicable to the disclosure of information concerning any crime or civil wrong, whether committed or in contemplation. But, in each case, the public interest must be borne in mind. It is difficult to conceive of any circumstances in which it will not be in the public interest to disclose information about past or proposed crimes. Similarly, the disclosure of proposed civil wrongs would always seem to be in the public interest since society has an interest in ensuring that its laws, whether civil or criminal, are respected. But the circumstances of a disclosure of a past civil wrong must be carefully assessed to determine whether its disclosure really is in the public interest, or whether this would serve only to raise quibbling enmities and thus destroy, rather than advance, the public welfare.

Finally, courts seem to have accepted the view that the defence cannot be invoked to justify the disclosure of information that reveals something of benefit to society, as opposed to some misconduct.[169]

The public interest in maintaining the confidentiality of government information was addressed, albeit indirectly, in *Attorney-General of Ontario v. Gowling & Henderson*.[170] In that case, Rosenberg J. dealt with the issue of the confidentiality of sensitive information, particularly Cabinet documents, and whether a whistleblowing exception would apply on the facts of the case.

In *Gowling & Henderson*, counsel for the Attorney General had learned that the law firm of Gowling & Henderson had in its possession, in regard to a Divisional Court declaration it was seeking, a number of internal government documents, including Cabinet documents. Some of these documents had been received from the firm's clients in support of the application for the declaration; other documents had been obtained from a source referred to as "X" within the Ministry of Correctional Services; and yet others came from a totally unidentified source.[171] In a motion for judgment before the High Court of Justice, the Attorney General sought, *inter alia*, the return of these documents and the identification of those who had released them.[172]

In considering whether the Court should order the disclosure of the sources' identities, and particularly the identity of the source within the Ministry of Correctional Services, Rosenberg J. turned his mind to whether a whistleblowing exception could be said to exist on the facts of the case.[173] Mr. Justice Rosenberg appeared to concede the possibility that, if such an exception were found, the Crown employees involved would be entitled to have their anonymity respected by the Court.[174] However, he stated that, "[u]nless a justification for their actions can be found at law, the unknown persons have committed a flagrant breach of their fiduciary duty to keep secret confidential matters which come to them in the course of their employment",[175] since "[a]ll servants, agents or employees of Her Majesty the Queen in right of Ontario are bound not to disclose confidential information or improperly deal with the property of their employer".[176]

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[169] *Ibid.*, at 340-41.

[170] (1984), 47 O.R. (2d) 449, (1985), 12 D.L.R. (4th) 623 (H.C.J.) (subsequent references are to 47 O.R. (2d)).

[171] *Ibid.*, at 451-52.

[172] *Ibid.*, at 454-55.

[173] *Ibid.*, at 459-63.

[174] *Ibid.*, at 455.

In the end, Mr. Justice Rosenberg found no justification for the disclosures and, therefore, he granted the Attorney General the order sought. His Lordship, distinguishing *Initial Services Ltd. v. Putterill*,[177] noted that that case concerned an unsuccessful application by the defendant company to strike out the whistleblowing defence raised by an ex-employee, Mr. Putterill. Mr. Putterill had revealed to the press that his former employer had engaged in a price-fixing scheme, with other laundering firms, that had not been registered as required by the *Restricted Trade Practices Act, 1956*. Moreover, the company had published a circular in which it attributed its price increases not to its agreement to fix prices but to the selective employment tax. On the basis of these allegations, the Court of Appeal refused to strike out the defence.

Mr. Justice Rosenberg noted that, with respect to the case at bar, what was alleged against the Crown was "an error in judgment or in priorities" and not "fraud or corruption".[178] On this basis, he held that *Initial Services Ltd. v. Putterill* was inapplicable.[179] Moreover, His Lordship noted that the disclosures had occurred in advance of the judicial review proceeding for the declaration that was sought. The information that was in fact leaked could have been sought through judicial channels in the course of this proceeding to determine whether there had been wrongful conduct on the part of the Ministry.

In short, disclosure was not warranted in the instant case. Rosenberg J. said that "[t]he message must be clear that the appropriate process must be followed ...".[180] His Lordship expressed himself out of sympathy with "a public servant who arbitrarily decides that certain Cabinet documents should be disclosed and takes it on himself to disclose them".[181] He concluded that "[t]he surreptitious delivery of confidential material cannot be sanctioned".[182]

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[175] *Ibid.*, at 457.

[176] *Ibid.*, at 454.

[177] *Supra*, note 95.

[178] *Supra*, note 170, at 463.

[179] *Ibid.*, at 462-63. In focusing on "fraud or corruption" as, it would seem, preconditions for invoking the whistleblowing defence, His Lordship appeared to be adopting a narrow reading of that defence.

[180] *Ibid.*, at 463.

[181] *Ibid.*, at 458.

[182] *Ibid.*, at 463. Mr. Justice Rosenberg noted with approval, and applied, the judgment of Sir John Donaldson M.R. in the English Court of Appeal case of *Secretary of State for Defence v. Guardian Newspapers Ltd.*, [1984] Ch. 156, [1984] 2 W.L.R. 268 (C.A.), aff'd [1985] A.C. 339, [1984] 3 W.L.R. 986 (H.L.). In that case, the Secretary had sought, successfully in the result, to force the Guardian to disclose the identity of the

Whether a public interest whistleblowing defence to a breach of confidence action will be successful will depend, in part, on the nature of the evidence justifying disclosure and on the person to whom disclosure was made.

We turn first to the question of what evidence justifies disclosure, one that has been called "the most difficult question in this area of the law, and one on which the cases afford little guidance".[183] One commentator has stated that, in the ordinary case where the defence is raised, two principles should guide the court. First, "a disclosure should be justified only if the person making it has reasonable ground for believing that a crime or civil wrong has taken, or will take, place".[184] The second principle relates to the need to prove good faith on the part of the person disclosing the information. Good faith may be determined by the circumstances in which the disclosure is made and the person who receives the disclosure.[185] However, "[i]f the information which is disclosed reveals the existence of a crime, there can be no confidence about the crime, and the motivation of the person making the disclosure will be irrelevant".[186]

With respect to the person to whom confidential information has been given, in a *dictum* in *Initial Services Ltd. v. Putterill*,[187] Lord Denning M.R. declared:[188]

> The disclosure must, I should think, be to one who has a proper interest to receive the information. Thus it would be proper to disclose a crime to the police; or a breach of the *Restrictive Trade Practices Act, 1956*, to the registrar. There may be cases where the misdeed is of such a character that the public interest may demand, or at least excuse, publication on a broader field, even to the press.

However, in the same case, Salmon L.J. expressed strong reservations concerning the argument made by counsel for Initial Services Ltd. that, unless disclosure is made to the proper party, the defence fails:[189]

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government employee who had leaked to the newspaper a secret document, relating to the deployment of the cruise missile, sent by Defence to the Prime Minister and other members of the Cabinet. The Crown's interest in identifying the informant and plugging the leak was upheld.

[183] Gurry, *supra*, note 4, at 341.

[184] *Ibid.*, at 343. See *Butler v. Board of Trade*, [1971] Ch. 680, [1970] 3 All E.R. 593, and *Gartside v. Outram*, *supra*, note 151.

[185] Gurry, *supra*, note 4, at 344.

[186] Gurry, *ibid.* Motivation could be of relevance, however, if, for example, a dismissed employee were seeking reinstatement.

[187] *Supra*, note 95.

[188] *Ibid.*, at 148.

[189] *Ibid.*, at 150-51. In *Canadian Javelin Ltd. v. Sparling* (1978), 4 B.L.R. 153 (F.C., T.D.), at 168-69, Gibson J. overstated *Initial Services Ltd.*, holding that that case established conclusively that, for a public interest defense to succeed in an action for breach of the *equitable* obligation (as opposed to the so-called "common law" obligation, by which Gibson J. refers to all duties of confidence that arise apart from being imposed by equity) disclosure *must* be to proper parties alone. No note was taken of Lord

> To put it at its lowest, that argument does not seem to me self-evident. What is clear now is that it raises questions of great importance with far reaching consequences about which there is very little relevant authority. I think that it would be quite impossible to strike out a defence on the narrow ground that, although there is an exception in this case, Mr. Putterill went to the wrong person to disclose the information.

It should be noted that, in *Initial Services Ltd.*, the employee had resigned before he engaged in whistleblowing. Where a person whistleblows while remaining in the alleged wrongdoer's employ, the duty of loyalty remains operative. Loyalty would appear to demand that disclosure beyond internal channels should be the last resort. Recourse to internal channels, where available and where likely to be effective, is required so that problems may be resolved internally, without unjustifiably embarrassing or prejudicing the employer.[190] Thus, in the Ontario Grievance Settlement Board case of *Re Ontario Public Service Employees Union (MacAlpine) and the Crown in Right of Ontario (Ministry of Natural Resources)*,[191] Arbitrator Jolliffe, speaking for the majority, upheld the view of Arbitrator Weiler in *Lehnert*[192] that an employee has a duty, in Arbitrator Jolliffe's words, ''to be sure of his facts'' before whistleblowing and to ''exercise good judgment in acting on his knowledge''.[193] Consequently, ''[i]f an internal avenue of redress or investigation is open to him the employee must consider whether that alternative is appropriate, not because the truth should be hidden but because the internal remedy may be the most effective''.[194]

Denning M.R.'s tentative expression of this qualification and Lord Salmon L.J.'s reservations. An appeal to the Federal Court of Appeal, unreported (September 27, 1979, F.C.A.) (see note, following the headnote to the Trial Division report, at 156), was dismissed unanimously. The Court appeared not to have considered the lower court's interpretation of *Initial Services Ltd.*, holding for the defendant on different grounds.

[190] In this same vein, loyalty also demands that the whistleblowing be as temperate as possible and that no confidential information should be revealed in the process except where absolutely necessary to secure correction of the wrongdoing: see *Lehnert*, *supra*, note 10.

[191] Unreported (November 18, 1982, G.S.B., Jolliffe) (hereinafter referred to as ''*MacAlpine*'').

[192] *Supra*, note 10, quoted extensively at 67-69 of the *MacAlpine* decision.

[193] *Supra*, note 191, at 84.

[194] *Ibid*. In the United States, commentators have expressed similar views, even those most supportive of whistleblowing. For example, in 1971 Professor Arthur S. Miller, one of the participants in the Nader-sponsored ''Report of the Conference on Professional Responsibility'', and one of the first law professors to apply constitutional law principles to corporate government, expressed the following concern:

> One should be very careful about extending the principle of whistleblowing unduly. Surely it can be carried too far. Surely, too, an employee owes his employer enough loyalty to try to work, first of all, within the organization to attempt to effect change. Only when his way is blocked there, and only when the matter involved something more than mere trivia, should he put the whistle to his lips and blast away. There are no clear boundaries to how one might discern his duty in such

The only case of any substance to discuss whistleblowing by an Ontario Crown employee is the previously mentioned *MacAlpine* case.[195] This case is of particular significance for Arbitrator Jolliffe's views concerning the relationship between the oath of secrecy[196] and the disclosure of government information allegedly evidencing wrongdoing, and is discussed in more detail in a subsequent section of this chapter dealing with the oath of secrecy.[197] The case does not deal primarily with the whistleblowing defence to a common law breach of confidence action. However, given the restrictiveness of the oath relative to the common law duty of confidentiality, the case is instructive concerning the likely availability of the common law defence if the oath were not a factor and the common law defence alone were invoked by an Ontario Crown employee.

d. Further Exceptions to the Common Law Duty

In this section, we shall describe briefly several further exceptions to the common law duty of confidentiality. Some need no explanation. For example, it is not a breach of the duty to comply with a court order for discovery or for disclosure of information to the court.[198] This immunity also applies to a disclosure required or authorized by statute, although only to the extent, of course, of the particular requirement or authorization.[199] However, a third party

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> instances. Each person must decide for himself, often with little external guidance, when he should say, 'Enough is enough'.

Miller, "Whistleblowing and the Law", in Nader, Petkas, and Blackwell (eds.), *Whistle Blowing: The Report of the Conference on Professional Responsibility* (1972) 25, at 30.

[195] *Supra*, note 191.

[196] Section 10(1) of the *Public Service Act*, *supra*, note 83, which provides for the oath of secrecy and requires it to be administered to civil servants (as defined in s. 1(a) of the Act) and, at the Minister's discretion, to other government employees (s. 10(3)), reads as follows:

> I, ..., do swear that I will faithfully discharge my duties as a civil servant and will observe and comply with the laws of Canada and Ontario, and, except as I may be legally required, I will not disclose or give to any person any information or document that comes to my knowledge or possession by reason of my being a civil servant.
>
> So help me God.

[197] See *infra*, this ch., sec. 3(b)(i)a.(1)i.

[198] See Law Commission Report, *supra*, note 112, paras. 2.8 and 4.57, at 87-88 and 133, respectively. See, also, *ibid.*, para. 4.57, at 133: "It is a defense to an action for breach of confidence that disclosure of the information in question has been ordered by a court under the powers attaching to its inherent jurisdiction, as, for example, its power to order discovery".

As a prerequisite to immunity there may, however, exist a duty to have apprised the court that the information was impressed with an obligation of confidence. Knowledge of this obligation might sway a court not to order discovery. See *ibid.*, para. 4.57, at 133.

See, also, *Canadian Javelin Ltd.* v. *Sparling*, *supra*, note 189, at 172.

[199] See Law Commission Report, *supra*, note 112, para. 4.55, at 132.

In Ontario, see, for example, s. 86(2)(c) of O. Reg. 538/84, made pursuant to s. 7(1)2 of the *Professional Engineers Act, 1984*, S.O. 1984, c. 13. Section 86(2)(c) who seeks to publish confidential information disclosed pursuant to a court order for discovery will normally be restrained.[200]

It is highly probable that no duty of confidentiality can be said to arise where the information, supposedly imparted in confidence, was already known by the person to whom the confidence was made.[201] Moreover, it appears that a person initially under a duty of confidentiality in regard to particular information may no longer be under that duty if he or she subsequently learns the same information by independent means.[202] There is, however, little direct authority on point.

There also appear to be circumstances under which allegedly confidential government information can be safely disclosed, at least by third parties, where the gravity of the subject matter of disclosure falls short of that which would justify whistleblowing, and where the disclosure is in the public interest.[203]

In *Attorney-General v. Jonathan Cape Ltd.*,[204] Lord Widgery C.J. declined to grant an injunction to restrain the publication of those parts of the diaries of the late Cabinet Minister Richard Crossman that disclosed confidential Cabinet discussions. His Lordship found that the Attorney-General had failed to discharge the onus of showing "(a) that ... publication would be a breach of confidence; (b) that the public interest requires that ... publication be restrained, and (c) that there are no other [facets[205]] of the public interest contradictory of and more compelling than that relied upon [by the Attorney-General]".[206] *Jonathan Cape Ltd.* is significant for holding that the onus lies on the government to show why publication of government information, arguably of great sensitivity, should not be allowed. However, it bears emphasizing that the defendant in this case was not the party who could be said to have breached the initial confidence.

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requires a professional engineer to "report" (on the pain of being found guilty of "professional misconduct") if the engineer believes that a "situation ... may endanger the safety or welfare of the public".

See, also, Gurry, *supra*, note 4, at 86-88.

[200] See *The Distillers Co. (Biochemicals) Ltd.* v. *Times Newspapers Ltd.*, *supra*, note 166.

[201] See Law Commission Report, *supra*, note 112, para. 4.71, at 143, and Gurry, *supra*, note 4, at 257.

[202] See Law Commission Report, *supra*, note 112, para. 4.72, at 143. See, also, *Estcourt* v. *Estcourt Hop Essence Co.* (1875), 10 L.R. Ch. App. 276, and Gurry, *supra*, note 4, at 112.

[203] With respect to the cases discussed in the following paragraphs, see Gurry, *supra*, note 4, at 103 *et seq.*

[204] *Supra*, note 88.

[205] The Law Commission Report, *supra*, note 112, para. 4.42, at 125, *n.* 229, commented that "[t]he term 'facts' appears in the Law Reports, but from the context this would appear to be an error. The report at [1975] 3 All E.R. 495 uses the term 'facets' ".

[206] *Supra*, note 88, at 770.

The case is also significant for holding that information that was once confidential can lose its aura of confidentiality with the passage of time. The interests of the confider in the confidentiality of information, at least in the case of government information, might diminish over time relative to the public's interest in disclosure.[207]

The principles laid down in *Jonathan Cape Ltd.* were applied by the High Court of Australia in *Commonwealth of Australia v. John Fairfax & Sons Ltd.*[208] In that case, an Australian publisher had obtained clandestinely, and most likely from a government employee, classified documents relating to Australian defence and foreign policy in Southeast Asia. The government sought an injunction to prevent publication.

Although the plaintiff obtained its injunction, it managed to do so only on the basis of copyright.[209] However, Mason J. made several interesting observations in regard to the equitable remedy of the injunction in breach of confidence actions, especially where the government acts as plaintiff. In the words of His Lordship:[210]

> The equitable principle has been fashioned to protect the personal, private and proprietary interests of the citizen, not to protect the very different interests of the executive government. It acts, or is supposed to act, not according to standards of private interest, but in the public interest. *This is not to say that Equity will not protect information in the hands of the government, but it is to say that when Equity protects government information it will look at the matter through different spectacles.*
>
> It may be sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism. But it can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable, in our democratic society, that there should be a

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[207] *Ibid.*, at 770-77. See Law Commission Report, *supra*, note 112, para. 4.43, at 45-46. It should be noted that, by statute in the United Kingdom, certain government information becomes available to the public by right after a thirty year period, or, in limited cases, earlier: *Public Records Act 1958*, c. 51. In Ontario, under the proposed *Freedom of Information and Protection of Individual Privacy Act, 1986*, *supra*, note 100, a general twenty year period would obtain. See, for example, s. 12(2)(a) in regard to records revealing the substance of deliberations of an Executive Council meeting. See, also, s. 13(3).

[208] *Supra*, note 89.

[209] *Ibid.*, at 498. Mason J. made it clear, however, that what was restrained was publication of the documents in their *actual form* (*ibid.*):

> To say that the enforcement by injunction of the plaintiff's copyright in documents amounts indirectly to protection of the information contained in the documents is to confuse copyright with confidential information. Copyright is infringed by copying or reproducing the document; it is not infringed by publishing information or ideas contained in the document so long as the publication does not reproduce the form of the literary work.

[210] *Ibid.*, at 492-93 (emphasis added).

> restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action.
>
> *Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.*
>
> The court will not prevent the publication of information which merely throws light on the past workings of government, even if it be not public property, so long as it does not prejudice the community in other respects. Then disclosure will itself serve the public interest in keeping the community informed and in promoting discussion of public affairs. If, however, it appears that disclosure will be inimical to the public interest because national security, relations with foreign countries or the ordinary business of government will be prejudiced, disclosure will be restrained. There will be cases in which the conflicting considerations will be finely balanced, where it is difficult to decide whether the public's interest in knowing and in expressing its opinion, outweighs the need to protect confidentiality.

Were it not for the Commonwealth's successful invocation of copyright, Mason J., taking the approach described above, and considering the fact that limited publication had already taken place,[211] would have denied the injunction.[212]

It must be emphasized that both *Jonathan Cape Ltd.* and *John Fairfax & Sons Ltd.* concerned publication by third parties. Although third parties may be subject to a duty of confidentiality, the courts are generally less inclined to impose such an obligation on them than on parties, such as employees, who owe the duty directly to the plaintiff. Third parties, in most circumstances, have given no understanding, implicit or otherwise, to treat information as confidential.

Nevertheless, the cases are of undoubted importance for what they say about the government's interest in the confidentiality of its information. This is particularly true of *John Fairfax & Sons Ltd.*, where the Court showed a willingness, on its own determination of the public interest, to examine critically the government's claim to confidentiality.

Finally, reference should be made once again to the English Court of Appeal case of *Woodward v. Hutchins*.[213] In that case, the plaintiffs, professional entertainers, had sought to project a public image that was belied by private (or not so private) conduct that, in effect, invited a correction of that distorted image by means of the disclosure of information concerning their conduct. A novel aspect of this case was that Lord Denning M.R., in balancing "the public interest in maintaining the confidence" against "the public interest in knowing the truth",[214] decided in favour of the latter on the ground that there is a public interest in "truth in publicity" analogous to the public interest in "truth in advertising".[215]

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[211] *Ibid.*, at 494.

[212] *Ibid.*

[213] *Supra*, note 137.

Lord Denning M.R.'s reasoning is reminiscent of his decision in *Initial Services Ltd. v. Putterill.*[216] In that case, he stated that, arguably, Mr. Putterill's public interest defence could be sustained on the sole basis that, assuming the correctness of Mr. Putterill's charge, Initial Services Ltd.'s circular to the public, explaining the company's price increases, was deliberately misleading.[217]

In the opinion of one commentator,[218] in a misleading publicity case, intentional fraud or deceit must be shown, as suggested by the earlier case of *Initial Services Ltd.*, if a defence to a breach of confidence action is to be made successfully. To the extent that *Woodward v. Hutchins* could be interpreted to hold that innocent misrepresentation alone might justify the disclosure of confidential information, the case is suspect.[219] Nonetheless, *Woodward v. Hutchins* may permit a breach of confidence to reveal "iniquity" that would fall short of the requisite seriousness necessary to sustain a whistleblowing exception to the duty of confidentiality.

3. LEGISLATION

(a) POLITICAL ACTIVITY

(i) General

A variety of activities, covering a spectrum of commitment and involvement, may justifiably be regarded as political. At one end of the continuum, a person may run for office as a candidate of a party during a federal or provincial election; at the other, a person may simply donate funds anonymously to a political cause that is unrelated to a particular political party. In between are a host of different political activities involving varying degrees of commitment, action, and publicity.[220]

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[214] *Ibid.*, at 764. This explicit weighing of interests, characterizing the first as well as the second as a "public" interest, was, in itself, another significant feature of the case. Traditionally, courts have spoken only of a *private* interest in confidentiality, which is to be considered in opposition to a public interest in disclosure and public receipt of the information.

[215] *Ibid.*

[216] *Supra*, note 95.

[217] *Ibid.*, at 149.

[218] Gurry, *supra*, note 4, at 339-40, citing *dicta* in the House of Lords decision in *British Steel Corporation v. Granada Television Ltd.*, *supra*, note 155, at 455, 461, and 479-80.

[219] Gurry, *supra*, note 4, at 339-40.

[220] For a useful list of the various kinds of political activity, see Kernaghan, *Ethical Conduct: Guidelines for Government Employees* (1975), at 54-57.

As might be expected, the present Ontario law does not specifically address whether Crown employees may engage in each of the possible types of political activity; only certain kinds of activity have been the subject of legislation or decisions of courts or administrative tribunals. To the extent that proscriptions have not been established in legislation or at common law, Crown employees are as free to participate in political activity as other persons in Ontario.

Under existing law, a distinction is drawn between political activity that is connected with a provincial or federal political party, which we shall identify as "partisan political activity", and other political activity, which we shall refer to as "nonpartisan political activity". For the purpose of exposition, we believe that it is useful to adopt this distinction.

The distinction between partisan and nonpartisan political activity is delineated in the major piece of legislation regulating political activity, the *Public Service Act*.[221] The relevant provisions, sections 11-16, were first introduced in 1963 as sections 9a-9f of *The Public Service Act, 1961-62*[222] by *The Public Service Amendment Act, 1962-63*.[223] Prior to the enactment of these provisions, the only indication of legislative policy bearing on the question of political activity was an 1897 resolution of the Legislative Assembly. The so-called "Garrow resolution" — named for Mr. James Thompson Garrow, the Liberal M.P.P. for Huron West who moved its adoption — dealt with the issue of political activity in the following terms:[224]

> Resolved, That this House is of the opinion that officers or clerks of the civil or public service of the province, or permanent employees, who solely or for the most part obtain their livelihood in the public service, should not actively participate in provincial or Dominion election campaigns, and that officers or clerks of the civil service should not become candidates for municipal councillors.

We find it particularly interesting, since the Commission's Reference is premised on a perception that the present law may be too restrictive, that, at the time of their introduction, the predecessors to sections 11-16 of the present Act were regarded as a liberalizing measure. Indeed, on presenting the Bill for First Reading, the Provincial Treasurer, the Hon. J.N. Allan, stated that "[i]n many respects this bill could be considered model legislation for a progressive democratic state".[225] In elaborating upon the purpose of the legislation, he commented as follows:[226]

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[221] *Supra*, note 83. See, also, *Legislative Assembly Act*, R.S.O. 1980, c. 235; *Election Act, 1984*, S.O. 1984, c. 54; and *Crown Employees Collective Bargaining Act*, R.S.O. 1980, c. 108.

[222] S.O. 1961-62, c. 121. Sections 11-16 of the *Public Service Act* appear in Appendix 2 to this Report.

[223] S.O. 1962-63, c. 118, s. 3. Section 3 enacted ss. 9a-9f of *The Public Service Act, 1961-62*, which appeared subsequently as ss. 11-16 of *The Public Service Act*, R.S.O. 1970, c. 386.

[224] *Ont. Leg. Ass. Deb*. Feb. 14, 1963, at 717.

> The political activity sections of the bill should encourage the public servants to take a greater interest in our political and social institutions, to the end that our government activity at all levels, local, provincial and federal, should be enriched and strengthened. In the days of positive government it is necessary that we have the minimum of restrictions on the persons of high qualifications who work for the province. Each employee will be guided by his own wishes in such matters but can feel free to participate if it is his wish to do so.

The views of the Provincial Treasurer concerning the ameliorative effect of the proposed legislation do not appear to have been challenged; the Bill generated virtually no discussion and certainly no adverse comment in the Legislative Assembly.[227]

Since their enactment in 1963, the provisions of the *Public Service Act* governing political activity have remained intact; only the regulations to the Act, which identify the classes of Crown employee whose political activity is most severely restricted, have been amended.[228]

We shall turn now to consider the treatment of partisan political activity.

(ii) Partisan Political Activity

a. Candidacy

In dealing with the issue of candidacy for office, the *Public Service Act* distinguishes between two classes of Crown employee. Since this dichotomy is relevant to other political activities, we shall explain it at the outset.

The *Public Service Act* identifies a class of persons whose political rights are more restricted than those of other Crown employees. The more restricted group consists of deputy ministers and other Crown employees in positions or classifications designated in the regulations made under section 30(1)(u) of the Act. Section 21 of the regulations to the Act[229] indicates that the positions and classifications listed in Schedule 2 constitute the group of restricted employees. The Schedule, which appears as an Appendix to this Report,[230] identifies certain managerial, supervisory, and senior personnel in each Ministry, including agencies, boards and commissions, and lists specific positions in certain Ministries. For ease of reference, we shall hereinafter refer to the restricted class of Crown employees collectively as "deputy ministers and Schedule 2 employees".

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[225] *Ibid.*

[226] *Ibid.*, at 717-18.

[227] There was no discussion on Second Reading: see *Ont. Leg. Ass. Deb.*, March 5, 1963, at 1344. On Third Reading, a few questions respecting the ambit of the restrictions were asked, but there was no objection to the substance of the Bill: see *Ont. Leg. Ass. Deb.*, Apr. 2, 1963, at 2463-64.

[228] Compare the positions listed in Schedule 2 in the following regulations: O. Reg. 260/63; R.R.O. 1970, Reg. 749; and R.R.O. 1980, Reg. 881, as am. by O. Reg. 38/84, s. 1.

The most recent amendment can be readily explained. In *Mahlberg v. Ferguson* (1983), 44 O.R. (2d) 239, 3 D.L.R. (4th) 755 (Div. Ct.), the Divisional Court held that s. 11 of the *Public Service Act* (dealing with the right to run for municipal office) prevailed over s. 62(b) of R.R.O. 1980, Reg. 791, issued under the *Police Act*, R.S.O. 1980, c. 381, which created an offence if a member of the Ontario Provincial Police took "any part in politics". An application had been brought by an OPP constable for an order quashing a charge of discreditable conduct against him and prohibiting further proceedings from being taken against him. His offence was that he had become a candidate and was elected as a member of the township council. The application succeeded. Shortly after this decision, O. Reg. 38/84 amended Schedule 2 by adding thereto certain positions within the Ontario Provincial Police.

Section 12(1)(a) of the *Public Service Act* provides that, subject to section 12(2), a Crown employee cannot "be a candidate in a provincial or federal election or serve as an elected representative in the legislature of any province or in the Parliament of Canada".[231] Section 12(2) contains an exception to the general prohibition: Crown employees, other than deputy ministers and Schedule 2 employees, may be granted a leave of absence, without pay, in order to become a candidate in a provincial or federal election. To obtain leave, the Crown employee must apply to the Lieutenant Governor in Council through his or her Minister. Since, under section 12(2), every application *must* be granted, Crown employees, other than the excluded class of deputy ministers and Schedule 2 employees, are entitled to leave as a matter of right.

Any leave of absence granted under section 12(2) cannot be "longer than that commencing on the day on which the writ for the election is issued and ending on polling day", and it cannot be "shorter than that commencing on the day provided by statute for the nomination of candidates and ending on polling day".

Upon election to office, a Crown employee must resign immediately from his or her position.[232] Where a Crown employee has resigned, the employee may be reappointed to his or her previous position or to another position for which he or she is qualified, upon its next becoming vacant, provided that the employee ceases to be an elected representative within five years of the resignation and applies for reappointment to the position within three months of ceasing to be an elected representative.[233] Thus, after five years in elected office, a Crown employee is obliged to choose which career he or she is to follow. The imposition of the five year limit seems to reflect a view that, at some point, involvement in partisan politics as an elected representative may affect either the person's impartiality, or at least the perception of that impartiality, even for Crown employees not in the excluded group. Another concern may be that, after five years, a person may be thought to lose whatever expertise and knowledge would otherwise justify a return to his or her original, or a similar, position.

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[229] R.R.O. 1980, Reg. 881.

[230] See Appendix 3, *infra*.

[231] See, also, *Election Act, 1984*, *supra*, note 221, s. 26(1)(d).

[232] *Public Service Act*, *supra*, note 83, s. 12(3).

[233] *Ibid.*, s. 12(4).

Since there are no published statistics on the number of Crown employees who have been granted leave to become candidates, we made inquiries of each deputy minister in order to ascertain the incidence of requests under section 12(2). The responses indicated that very few applications have been made; almost half the Ministries have never received a request, or have not received a request within the five or six year period in respect of which their records were searched.

A deputy minister or Schedule 2 employee who contemplates becoming a candidate in a provincial or federal election must choose between candidacy and his or her position. If such a person becomes a candidate, he or she must resign, without the right to reappointment enjoyed by other Crown employees, or face the risk of dismissal.[234]

A related matter, which is not addressed in either the *Public Service Act* or the regulations thereunder, is whether a Crown employee may engage in political activity necessary to secure nomination as a candidate. The guidelines that have been developed by the Civil Service Commission, and that are communicated after an election has been called,[235] advise that Crown employees, other than deputy ministers and Schedule 2 employees, are permitted to seek the nomination of their parties. However, they are cautioned that, in doing so, they must have particular regard to the express prohibitions that appear in the *Public Service Act*. The guidelines also emphasize that the leave of absence available under section 12(2) does not apply to Crown employees seeking a nomination, but only to those who have become candidates. It would appear that Crown employees who wish to take leave to seek nomination, or indeed to engage in any other political activity permitted under the Act, may apply to their deputy minister for discretionary leave for a special purpose under the regulations to the *Public Service Act*.[236]

b. Soliciting of Funds

Section 12(1)(b) provides that, except for a Crown employee who has been granted a leave of absence to be a candidate in a federal or provincial election,

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[234] In *Re Dick and Attorney-General for Ontario* (1973), 2 O.R. (2d) 313, 28 C.R.N.S. 211 (Div. Ct.), the Court dismissed an application for judicial review of a decision of the Public Service Grievance Board. The applicant was an Assistant Crown Attorney who ran for the nomination of a political party and thereby became a candidate in a federal election within the meaning of s. 12(1)(a) of the *Public Service Act*. At issue before the Divisional Court were questions respecting the propriety of the dismissal proceedings, including an allegation of bias. These were resolved in favour of the Crown.

[235] The guidelines are communicated through memoranda, and in *Topical*, the Ontario government newspaper: see, for example, *Topical*, "Political Activity: What's Allowed" (April 12, 1985), at 6.

[236] *Supra*, note 229, s. 74.

Crown employees are prohibited from soliciting funds for a provincial or federal political party or for a candidate. Since such leave is unavailable to deputy ministers and Schedule 2 employees, they cannot engage in the solicitation of funds for this purpose at any time.

c. Canvassing and Other Active Work in Support of a Party or Candidate

"Canvassing" is not defined in the *Public Service Act*. It is generally understood to mean the personal solicitation of support for a cause, party, or candidate, and usually involves the expression of opinion or the dissemination of literature, or both, by the person seeking to enlist the support of another.

Under the *Public Service Act*, whether a person has a right to canvass depends on his or her classification and whether the canvassing is to be done during an election. Section 13(1) prohibits civil servants, during a provincial or federal election, from canvassing on behalf of a candidate in the election. At all other times, however, civil servants, other than deputy ministers and Schedule 2 employees, are free to canvass on behalf of candidates. No express prohibition, it should be observed, attaches to canvassing that is undertaken on behalf of a party rather than on behalf of a specific candidate. Crown employees who are not civil servants are not subject to any restriction with respect to canvassing and hence may do so even during an election.

Section 13(2) of the Act provides that, notwithstanding the provisions of section 13(1), deputy ministers and Schedule 2 employees cannot "at any time canvass on behalf of or otherwise actively work in support of a provincial or federal political party or candidate." The intended ambit of the very general prohibition against working actively in support of a party or candidate is unclear, since certain of the usual political activities, such as canvassing, solicitation of funds, and public expression of partisan views, are denied expressly to deputy ministers and Schedule 2 employees. The general prohibition would appear to be directed against other activities that have been thought to affect the fact and appearance of impartiality and independence, for example, serving as an officer of the local riding association of a political party.

The significance of this general prohibition against active work in support of a candidate or party may be appreciated by contrasting the position of deputy ministers and Schedule 2 employees with that of other Crown employees, who are not subject to a similar restriction. Under the *Public Service Act*, the latter are subject only to the specific prohibitions in the Act and are free to engage in other activities.

The importance of this distinction is well illustrated by *Re McKay and the Crown in Right of Ontario (Ministry of Northern Affairs)*.[237] In that case, the Crown Employees Grievance Settlement Board allowed the grievance of a Crown employee who had been threatened with dismissal because he had become president of the local New Democratic Party riding association. McKay was not a Schedule 2 employee. He had been threatened with dismissal on the ground that, by virtue of assuming the office of president, he was allegedly acting "in a manner contrary to the spirit and general intent of sections 11 to 15" and had specifically contravened section 14.[238] There was no evidence that the grievor had engaged in any of the activities prohibited by the Act, including that prohibited by section 14. The Board refused to conclude that holding the office of president in and of itself was a contravention of the *Public Service Act*. It reasoned as follows:[239]

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[237] (1981), 28 L.A.C. (2d) 441 (G.S.B., Rayner).

> After considering arguments of both counsel, the board is of the opinion that the grievance should succeed. Section 16 of the Act states that a contravention of ss. 11, 12, 13, 14 or 15 shall be deemed to be sufficient cause for dismissal. That wording is quite clear. Before s. 16 can operate, a contravention of the earlier sections must take place. Section 16 does not state that a contravention of the spirit of the Act shall be deemed to be sufficient cause for dismissal.
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> Moreover, it is the Board's view that the Act should be read with some care. There is no doubt that the Act limits in a fundamental fashion, the political activity of civil servants. To that extent, the Act curtails certain basic rights of the civil servant as a citizen of this country. The constitutionality of the Act is not in issue before us, and our comments should not be taken to imply, in any way, any conclusions with respect to the constitutionality of the Act. However, our comments are directed as to how the Act should be read. In our view, the sections of the Act should be read literally and should not be given an expanded meaning which would be required if [the Ministry's] position is accepted. We agree with [counsel for the grievor] when he says that the Act attempts to preserve the public appearance and [*sic*] neutrality by the civil service. The mere fact that a civil servant holds the office of presidency of a Riding Association does not, by itself, destroy that appearance. A civil servant, even though not holding any particular office in a Riding Association, may be very active in that Riding Association. However, until that person violates a specific provision of the Act, one cannot say that the Act precludes the person from that activity.
>
> Although it may be very likely that the holding of such an office could lead to a violation of the Act, the evidence of the grievor establishes that the holding of the office does not invariably lead to such a violation. In our view, for the Ministry to succeed in its position, the Board must come to a conclusion that the holding of the office would invariably lead to a violation of the Act, and this we cannot do.

d. *Political Activity During Working Hours*

Section 15 of the Act states that "[a] Crown employee shall not during working hours engage in any activity for or on behalf of a provincial or federal political party." This prohibition would, of course, apply only to those partisan political activities that are not otherwise specifically banned.[240]

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[238] *Ibid.*, at 442.

[239] *Ibid.*, at 447-48.

[240] For example, the prohibition on canvassing during a provincial or federal election on behalf of a candidate applies to civil servants, but not to other Crown employees. As a consequence of s. 15, to the extent that Crown employees who are not civil servants wish to canvass, they cannot do so during working hours.

e. Association of Position with Political Activity

Section 12(1)(c) of the *Public Service Act* provides that, except where a Crown employee has been granted leave to become a candidate in a provincial or federal election, an employee shall not "associate his position in the service of the Crown with any political activity". This prohibition would apply to political activities otherwise permitted. If, for example, a Crown employee who is not a civil servant were canvassing for a candidate during an election, he or she could not, in doing so, publicize the fact that he or she is a Crown employee. There would appear to be at least two concerns underlying the prohibition: first, associating one's position as a Crown employee, even with permissible political activity, might impair the public perception of an impartial civil service; and secondly, such activity, in some cases, might be perceived as an implicit threat or promise of preferential treatment.

The reason for the exception in favour of Crown employees who have received leave to be candidates would appear to be simply to permit them to state their occupations or professions and place of employment, in the same way that their opponents may do.

f. Public Expression on Political Matters

Section 14 of the Act provides that, except where a leave of absence to become a candidate has been granted, "a civil servant shall not at any time speak in public or express views in writing for distribution to the public on any matter that forms part of the platform of a provincial or federal political party".[241] Crown employees who are not civil servants, therefore, are free to communicate their views without express legislative restriction. The Civil Service Commission guidelines, which are communicated once an election is called, advise that "Crown employees, other than classified employees, may speak in public and write for publication on matters provided that they do not violate any oath of secrecy".[242] However, to the extent that the principles of the decision of the Supreme Court of Canada in *Fraser*[243] may be extended beyond the context of public criticism of government to public comment generally, their public utterances may be subject to limitation.

On a literal reading, the prohibition set out in section 14 would appear to be very broad, given the all-encompassing nature of many party platforms. Applied strictly, it would constitute an absolute bar to public expression, which would extend beyond the bounds of what could properly be regarded as partisan political activity. In fact, section 14 has been given a more limited interpretation, which is reasonably commensurate with the philosophy of the *Public*

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[241] See *Re St. Onge and the Ministry of Northern Affairs*, unreported (December 14, 1984, P.S.G.B., Black), where the Public Service Grievance Board upheld the dismissal of the grievor, a Schedule 2 employee, who had sought the nomination of a political party and supported its platform in speeches, thus violating ss. 13(2) and 14 of the Act. He was also found to have violated s. 12(1)(b).

[242] See *supra*, note 235.

[243] *Supra*, note 3. See discussion *supra*, this ch., sec. 2(b)(ii).

Service Act. In a memorandum to all deputy ministers in the provincial government,[244] Mr. F.W. Callaghan, Q.C., then Deputy Attorney General of Ontario, explained as follows:

> All Crown employees may speak publicly and write for publication on matters of public interest provided they do not violate any oath of secrecy and provided the utterance is not on any matter that forms part of the platform of a provincial or federal political party. Is 'platform' to be given a broad or restrictive meaning in this context? Is it to mean the statement of principles upon which a political party is based or is it to mean the program put forward by a political party as the basis of a particular election campaign?
>
> Public utterances by Crown employees on the 'platform' of a political party, whether that term be broadly or narrowly interpreted, appears to offend against the principle that Crown employees should be seen to be non-partisan. However, because party platforms attempt to cover comprehensively the full range of activity in society the practical effect of a broad reading of the interpretation might be to muzzle Crown employees absolutely. A more reasonable interpretation of this prohibition might be that it prohibits such public utterances if they are expressly or otherwise clearly directed at or identified with the public position of a political party on some matter.

While this interpretation would narrow the restriction of section 14 on the public expression of views by civil servants, it should be noted that the statement applies to "[a]ll Crown employees" and thus would impose a limitation on Crown employees who are not civil servants that has no basis in the legislation.

Leaving aside this extension of the applicability of section 14, we observe that the more narrow interpretation given to party platform is not communicated in the Civil Service Commission guidelines, which simply repeat the language of the section. Moreover, this interpretation is apparently not widely known, as indicated by written and oral submissions that we have received, which evinced concern about the breadth and vagueness of the prohibition in section 14.

g. *Political Activities by a Union*

Pursuant to the *Crown Employees Collective Bargaining Act*,[245] public service unions, which are called "employee organizations", are prohibited from engaging in partisan political activity. The means by which this prohibition is effected is the statutory definition of "employee organization". The Act defines an "employee organization" as "an organization of employees formed for the purpose of regulating relations between the employer and employees under this Act", but specifically excludes from this definition an organization of employees that engages in partisan political activity.[246]

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[244] August 5, 1975.

[245] *Supra*, note 221.

[246] Section 1(1)(g) of the Act excludes an organization of employees that:

> (i) receives from any of its members who are employees any money for activities carried on by or on behalf of any political party,

(iii) Nonpartisan Political Activity

a. Introduction

Under the *Public Service Act*, political activity of a nonpartisan nature, that is, political activity unrelated to a provincial or federal political party, is permitted to a much greater extent than partisan political activity. The Act expressly sanctions certain political activity in relation to municipal elections, and is silent about other activities that are proscribed in connection with partisan politics.

b. Municipal Elections

Section 11 of the Act permits a Crown employee, except a deputy minister or a Schedule 2 employee, to be "a candidate for election to any elective municipal office, including a member or trustee of an elementary or secondary school board or a trustee of an improvement district, or [to] serve in such office or actively work in support of a candidate for such office", provided that the following conditions are met:

> (a) the candidacy, service or activity does not interfere with the performance of his duties as a Crown employee;
>
> (b) the candidacy, service or activity does not conflict with the interests of the Crown; and
>
> (c) the candidacy, service or activity is not in affiliation with or sponsored by a provincial or federal political party.

These conditions evince concern that the participation of Crown employees in municipal elections not detract from their ability to discharge their responsibilities, nor compromise the position of the Crown. The third condition, prohibiting political involvement that is connected with a provincial or federal political party, clearly follows from the same concern to ensure the fact and appearance of impartiality that underlies the prohibitions respecting partisan political activity.

Presumably, active work in support of a candidate in a municipal election may involve activities such as canvassing and fund raising. Given section 14 of the Act, it would appear that, where the Crown employee is a civil servant, he or she may speak in public or express views for distribution to the public to the extent that the communication does not address a matter forming part of the platform of a provincial or federal political party.

> (ii) handles or pays in its own name on behalf of members who are employees any money for activities carried on by or on behalf of any political party,
>
> (iii) requires as a condition of membership therein the payment by any of its members who are employees of any money for activities carried on by or on behalf of any political party,
>
> (iv) supports or requires its members who are employees otherwise to support any political party ....

Where a Crown employee has been elected to municipal office, he or she need not resign from Crown employment, as is required of a Crown employee who has been elected to the provincial legislature or the Parliament of Canada.

If a Crown employee wishes to become a candidate for election to municipal office or to work actively in support of a municipal candidate, he or she must determine whether the three prescribed conditions for participation are met. If this determination is incorrect, and one or more of the conditions is not satisfied, he or she will have to bear the consequences of this error, which, as we shall explain shortly, may involve dismissal.[247] Hence, under the present Act, a Crown employee who wishes to become involved in municipal politics assumes the risk that the Ministry may disagree subsequently with his or her assessment of entitlement to do so, and may apply disciplinary sanctions.

This danger is illustrated by *Re Hallborg and the Crown in Right of Ontario (Ministry of Revenue)*.[248] Mr. Hallborg, a neighbourhood property tax assessor, wished to run for alderman in a municipality that was located in the assessment region in which he worked, although it was not the municipality for which he was the assessor. In notifying the Regional Assessment Commissioner of this intention, Mr. Hallborg stated that the council meetings were usually held in the evenings and that he would declare himself unable to discuss any matters relating to assessment. The Deputy Minister of Revenue subsequently informed Mr. Hallborg that it was his view that, if elected, there would be a conflict of interest between his position as an alderman and his position as a property assessor, and that there would be a substantial possibility that his duties as the former would interfere with his duties as the latter. He also drew attention to section 16 of the *Public Service Act*, which provides that a contravention of section 11 of the Act shall be deemed just cause for dismissal.[249]

Mr. Hallborg was elected. Shortly thereafter, the Deputy Minister informed him that, in the circumstances, cause for dismissal existed under section 16, and that he was being dismissed. Mr. Hallborg brought a grievance before the Crown Employees Grievance Settlement Board alleging unjust dismissal.

By a majority, the Board concluded that the second condition, relating to conflict of interest, was not met and that therefore the grievor was not entitled to serve in the municipal office. It was of the view that, upon a consideration of the nature of the grievor's work and responsibility as an assessor and as a member of a municipal council, "the proper interests of an assessor conflict with the proper interests of a municipal counsellor [*sic*] in the same region."[250]

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[247] See *Public Service Act*, *supra*, note 83, s. 16.

[248] (1979), 22 L.A.C. (2d) 289 (G.S.B., Weatherill).

[249] *Ibid.*, at 290.

[250] *Ibid.*, at 292. The Board explained (at 292-93):

> Not only is the same person undertaking to 'serve two masters' whose interests

The conflict arose because the grievor, by virtue of his position as an assessor, had knowledge of, or access to, special information that would give him an advantage as a councillor.

The Ministry had indicated that it would consent to any determination that would convert the discharge to a suspension, provided that Hallborg either accepted a transfer to an adjoining assessment region or resigned his municipal office. Consequently, the Board made an award in those terms.

c. *Public Expression on Political Matters*

The *Public Service Act* addresses the question of the extent to which Crown employees may express views publicly only in relation to partisan politics. With respect to nonpartisan matters, the Act is silent.[251] This silence, however, does not necessarily mean that Crown employees are completely free to express their views publicly about these issues. As discussed earlier, the principles articulated by the Supreme Court of Canada in the *Fraser* case would impose a limitation on public criticism of government policy.[252] If the case were extended to public comment generally, public expression of views on nonpartisan matters would be prohibited to the extent that it would impair the impartiality of a Crown employee, either in fact or in appearance.

d. *Other Political Activities*

The *Public Service Act* does not address the issue whether it is permissible to engage in other forms of political activity, such as canvassing or the solicitation of funds for certain organizations or groups, that bear no relation to partisan politics or to municipal elections. If a Crown employee wished to distribute literature or collect funds in relation to a political issue on which neither a provincial nor a federal political party had taken a position, it would not be prohibited by the Act, unless he were to associate his position in the

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> are not the same and are sometimes opposed, but he may be seen, and reasonably so, as being in a position where it is open to him to take advantage in one position (even if not for his own benefit) of the special knowledge he has gained in the other. The constituent, ward, municipality or Province on the other side of some matter in which the council member with special knowledge is involved, might well feel, whatever the real case may be, that the situation is an unfair one. There is, in fact, a conflict of interest.
>
> . . . .
>
> The conflict of interest in this case is a significant and substantial one, and arises out of the very nature of the two obligations which the grievor has undertaken. It is not the sort of 'interest', arising out of some particular matter or transaction, to which the *Municipal Conflict of Interest Act*, 1972 (Ont.), c. 142, applies, and which can be dealt with by declaration and abstention. It involves rather a fundamental divergence of obligations.

[251] However, public expression on nonpartisan matters is subject to the general prohibition in s. 12(1)(c) that a Crown employee not "associate his position in the service of the Crown with any political activity".

[252] See discussion *supra*, this ch., sec. 2(b)(ii).

service of the Crown with that activity.[253] This would be the case even if the activity were to take place during working hours.

However, while political activity of this nature is not addressed by the *Public Service Act*, it would be regulated by the Crown employee's terms of employment and the common law respecting employment relations. Part II of the regulations made under the *Public Service Act*, which deals with conditions of employment, establishes certain general conflict of interest rules, which might be applicable. For example, section 20(1)(a) prohibits a public servant from engaging in outside work that interferes with the performance of his or her duties. Section 20(3) provides that, where "a public servant considers that he could be in a position of conflict with the interests of the Crown arising from any of his outside activities, he shall disclose the situation to his deputy minister, agency head or minister, as the case may be, and shall abide by the advice given". A failure to observe these provisions would entail a risk of dismissal.[254] Hence, if the activity were to interfere with the performance of the employee's duties — for example, if the employee were to engage in persistent and time consuming solicitation of funds during working hours — he or she would be subject to disciplinary action.

(iv) Sanctions

Where a Crown employee engages in political activity that is proscribed either by statute or as a matter of common law, he or she risks the application of disciplinary measures. As employer, the Crown has at its disposal various sanctions ranging in severity from an informal oral reprimand to dismissal from employment. The measure to be applied will depend on a variety of factors, the most important of which is the particular conduct in issue.

Under the *Public Service Act*, a deputy minister may dismiss a public servant from employment for cause in accordance with the regulations.[255] Section 16 provides that "[a] contravention of section 11, 12, 13, 14 or 15 shall be deemed to be sufficient cause for dismissal".

Where an employee[256] who is a member of the bargaining unit has been disciplined or dismissed or suspended from his employment, he or she may bring a grievance before the Crown Employees Grievance Settlement Board.[257] Where the Board determines that a disciplinary penalty or dismissal of an employee is excessive, it has power to substitute a penalty that "it considers just and reasonable in all the circumstances".[258] Thus, where an employee has been dismissed for a violation of one of the prohibitions respecting political activity, the Board may order another penalty instead. That, under the *Public Service Act*, the contravention is deemed just cause does not mean that dismissal must be the penalty; it simply relieves the Crown of the evidentiary burden of proving just cause for the dismissal.

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[253] The prohibition against associating one's position in the service of the Crown with any political activity, set out in s. 12(1)(c) of the *Public Service Act*, applies to all political activities, whether or not related to a provincial or federal political party. By contrast, the other prohibitions in the *Public Service Act* relate only to partisan political activity.

[254] *Supra*, note 229, s. 20(4).

[255] See *Public Service Act*, *supra*, note 83, s. 22(3).

[256] Under s. 1(1)(f) of the *Crown Employees Collective Bargaining Act*, *supra*, note 221, "employee" means a Crown employee within the meaning of the *Public Service Act*, with certain categories of person expressly excluded, such as "a person employed in a managerial or confidential capacity". This category of person is defined in some detail: see s. 1(1)(l).

Crown employees who are not members of the bargaining unit may bring a grievance before a different tribunal, the Public Service Grievance Board.[259] Although this Board has not been expressly given power to substitute a lesser disciplinary measure for dismissal, it has nonetheless interpreted it to be within its jurisdiction to do so.[260]

(b) CONFIDENTIALITY

Like the law respecting the limits on political activity, the law in Ontario governing whether, and the extent to which, Crown employees may disclose information acquired in the course of their employment draws on the general common law applicable to employment relations and on provincial legislation addressed specifically to their particular position as Crown employees. In an earlier section of this chapter, we discussed how the common law duties of loyalty and confidentiality affect the right of Crown employees to disclose information. In this section, we shall examine the legislative restrictions on Crown employees in respect of this matter. In addition to provincial legislation, Crown employees are subject to two federal statutes that may have the effect of prohibiting the communication of information, on pain of criminal liability.

We shall first discuss the relevant provincial legislation.

(i) Provincial Legislation

a. Statutory Requirements of Confidentiality

The legislative restrictions on disclosure arise from two types of statutory provision; the first requires that an oath of secrecy be sworn and the second expressly prohibits the disclosure of information. We shall consider each of these provisions in turn.

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[257] For a more detailed description of the structure of collective bargaining in the Ontario public service, and the availability of grievance procedures, see *supra*, ch. 1, sec. 3.

[258] *Crown Employees Collective Bargaining Act*, *supra*, note 221, s. 19(3).

[259] *Supra*, note 229, ss. 36-47. See *supra*, ch. 1, sec. 3.

[260] See, for example, *Re St. Onge and the Ministry of Northern Affairs*, *supra*, note 241, at 12-13, where the Board, after finding contraventions of ss. 12(1)(b), 13(2), and 14 of the *Public Service Act*, *supra*, note 83, considered whether it should substitute a lesser penalty than dismissal.

(1) *Oaths of Secrecy*

i. The General Oath of Secrecy

Under section 10(1) of the *Public Service Act*, civil servants must take the following oath of office and secrecy before they receive a salary:[261]

> I,........................, do swear that I will faithfully discharge my duties as a civil servant and will observe and comply with the laws of Canada and Ontario, and, except as I may be legally required, I will not disclose or give to any person any information or document that comes to my knowledge or possession by reason of my being a civil servant.
>
> So help me God.

While public servants who are members of the unclassified service are not subject to a similar condition, they may be required to take this oath by the minister in whose ministry they are employed.[262]

The oath of office and secrecy was first required to be taken in 1947.[263] Prior to its introduction, civil servants were obliged to take an oath of allegiance and office, which apparently responded to concerns about corruption and pecuniary conflicts of interest.[264] While the requirement of an oath of secrecy was a departure from past practice, the decision to include this measure inspired no debate and little comment in the Legislature.[265] The apparent degree of acceptance may have reflected the fact the legislation was enacted during the so-called "cold war"[266] and, more particularly, at a time when there was anxiety about security arising from publicized espionage trials in Canada and elsewhere.

In its original form, the oath of office and secrecy differed from that required under the present Act. In the original oath, the exception to the general promise of non-disclosure was broader. It stated that "except as ... may be legally authorized or required", information and documents shall not be disclosed; in 1962, with the enactment of a new *Public Service Act*, the reference to legal authorization was deleted.[267]

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[261] See, also, s. 10(2), which requires civil servants, before performing any duty as a member of the regular staff, to take the oath of allegiance set out therein.

[262] See *Public Service Act*, *supra*, note 83, s. 10(3).

[263] See *The Public Service Act, 1947*, S.O. 1947, c. 89, s. 4.

[264] See, for example, *The Public Service Act*, R.S.O. 1937, c. 15, s. 15, which required civil servants to take and subscribe the following oath:

> I *(A.B.)* solemnly and sincerely declare that I will faithfully and honestly fulfil the duties which devolve upon me as   and that I will not ask or receive any money, service or recompense, or matter, or thing whatsoever, directly or indirectly, in return for what I shall have done or may do in the discharge of any of the duties of my said office, except my salary or what may be allowed me by law or by an Order of the Lieutenant-Governor in Council.

[265] See *Ont. Leg. Ass. Deb.*, Oct. 27, 1947, at 949-50; Oct. 28, 1947, at 1037; and Oct. 29, 1947, at 1090-1102.

[266] See Ontario, *The Report of the Commission on Freedom of Information and Individual Privacy: Public Government for Private People* (1980) (hereinafter referred to as "Williams Commission Report"), Vol. 2, at 153.

The meaning of the oath is very unclear. On a literal reading, it would appear to forbid any and all communication of information that has been acquired in the course of employment by civil servants, except under legal compulsion; disclosure cannot be made even under the direction of supervisory personnel. It is thus much broader than the duty of confidentiality imposed at common law.[268] Indeed, section 10(1) would appear to prohibit civil servants from imparting information to each other.[269] The language of the oath is vague, offering little, if any, guidance to civil servants, short of indicating the need for extreme caution on their part. The unsatisfactory language of the oath has been the subject of criticism. In 1979, the late Honourable J. C. McRuer suggested that its language was seriously wanting:[270]

> You will note that the language is a clear prohibition on disclosure, 'except as I may be *legally required*,' not 'legally permitted.' What is a legal requirement? Nowhere do we find the term defined. In other statutes relative to non-disclosure, such words as 'to any person, not legally entitled thereto' are used. This is quite a different definition: 'legally required' connotes some legal compulsion, while on the other hand, non-disclosure, except to any person legally entitled thereto, emphasizes the entitlement, *not* requirement. The 'legal requirement' provision would appear to prohibit the private secretary to a minister from disclosing that the minister has a cold; but the latter provision would likely be construed that he would be at liberty to give me that information. The form of the oath imposed on civil servants is a legal absurdity.

In its Report, the Commission on Freedom of Information and Individual Privacy (Williams Commission) observed that "[o]bviously, in practice, many civil servants must, as a matter of daily routine, breach this oath in order to carry out their duties".[271]

By way of contrast to the prohibitions respecting political activity, the *Public Service Act* does not provide for a sanction in the event that a civil servant acts in contravention of his or her oath. It would appear, moreover, that an oath is not legally binding in the sense that a breach would give rise to remedies, but creates only a moral obligation on the person who swears it.[272]

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[267] *The Public Service Act, 1961-62*, *supra*, note 221, s. 9(1).

[268] See discussion *supra*, this ch., sec. 2(b)(iii).

[269] See Williams Commission Report, *supra*, note 266, Vol. 2, at 399.

[270] Address by Honourable J.C. McRuer, Conference on Law and Contemporary Affairs, University of Toronto (February 3, 1979), quoted in Williams Commission Report, *supra*, note 266, Vol. 2, at 153-54 (emphasis in original).

[271] *Ibid.*, at 154. See, also, *ibid.*, at 399.

[272] See *Attorney-General v. Jonathan Cape Ltd.*, *supra*, note 88, where Lord Widgery C.J. characterized the obligation resting on a former cabinet minister by reason of his oath of

However, if a civil servant were to disclose information or documents, he or she would risk dismissal on the ground that the disclosure was inconsistent with the general common law duties of loyalty and confidentiality,[273] and therefore constituted just cause for dismissal.[274]

The only Ontario case of which we are aware in which the oath has been discussed is *Re Ontario Public Service Employees Union (MacAlpine) and the Crown in Right of Ontario (Ministry of Natural Resources)*.[275] Mr. MacAlpine, a professional registered forester, gave an opposition Member of the Legislative Assembly copies of a letter and a memorandum from the deputy minister, and disclosed certain information to the Member. In addition, he filed a report about the conduct of certain employees of the Ministry of Natural Resources with his professional organization, the Ontario Professional Foresters Association (OPFA), and included copies of Ministry correspondence and memoranda. In disclosing this information and releasing these documents, Mr. MacAlpine sought to reveal that senior officials of the Ministry, including the deputy minister, were applying improper pressure on him and his direct supervisor to prepare data that would justify granting a licence to cut timber to a certain applicant. He alleged that granting a licence to this applicant would contravene the policy of the *Crown Timber Act*[276] and the Ministry's Forestry Management Manual because the area for which a licence was being sought had insufficient wood for the operations envisaged by the applicant.

Several months following the disclosures, the Ministry dismissed Mr. MacAlpine on the ground that he had acted in breach of his oath of office and secrecy and in violation of the Ministry's Code of Ethics. A grievance was brought before the Ontario Crown Employees Grievance Settlement Board.

The Board found that, in the circumstances, there was not just cause for dismissal. However, it did find that Mr. MacAlpine was at fault in some respects and that discipline was warranted. Pursuant to its authority under the *Crown Employees Collective Bargaining Act*,[277] the Board concluded that a just and reasonable penalty was suspension for one week without pay, but without loss of seniority. Since the grievor had already been dismissed for more than one week, the Board ordered his reinstatement effective one week following dismissal.

The Board found that the demands that were being made of Mr. MacAlpine and his supervisor were not consistent with the provisions of the

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office as a privy councillor as binding "merely in morals", in contradistinction to binding in law. For a discussion of this case, see *supra*, this ch., sec. 2(b)(iii)d.

[273] See discussion *supra*, this ch., sec. 2.

[274] Under s. 22(3) of the *Public Service Act*, *supra*, note 83, a deputy minister may, for cause, dismiss a public servant from employment.

[275] *Supra*, note 191.

[276] R.S.O. 1980, c. 109.

[277] *Supra*, note 221.

Crown Timber Act and the Forestry Management Manual, and that those demands were unreasonable and unfair to the staff who were asked to follow them. However, the Board also found that, contrary to Mr. MacAlpine's belief, the deputy minister was not involved in any impropriety.

The Board's analysis of the oath of office and secrecy is not entirely clear. It rejected an argument by counsel for the Crown that the oath should be read literally so as to preclude any unauthorized disclosure. This seemed to follow from its view that the meaning of the oath was unclear and, more importantly, from a perception that the oath had to be evaluated in light of recent government statements with respect to the desirability of "open government".[278] The Board concluded its discussion of the oath as follows:[279]

> We do not think the Oath can be interpreted liberally one day and strictly the next day, varying with whatever seems discrete [*sic*] or prudent at the moment. By one standard, the disclosure of information which may be embarrassing to a Ministry or its public servants is always indiscrete [*sic*] and therefore prohibited. By another standard, the public's right to know is paramount, regardless of possible embarrassment. Both standards call for subjective judgments, and both have been urged upon us in this case.
>
> On balance, we are persuaded that small operators in the Port Arthur Management unit and many other members of the public had a right to know about an internal dispute, the outcome of which could seriously affect their interests. To suppress such information by invoking the Oath in its literal form is not consistent with the principle of open government.

Having disposed of the oath, the Board then turned to analyze the question of just cause in terms of whether the conduct of the grievor had been in violation of his duty of fidelity. At this point, the analysis merges a discussion of the issue of confidentiality with an examination of the effect of public criticism of an employer on the employee's duty of loyalty. The threads of this discussion are difficult to disentangle.

The difficulty arises from the Board's reliance on *Re Ministry of Attorney-General, Corrections Branch and British Columbia Government Employees' Union*,[280] which, in considering the duty of fidelity, brought into its analysis questions respecting the disclosure of information. In that case, the arbitrator suggested that the question of loyalty should be analyzed as follows:[281]

> The issue of the application of an employee's obligation of fidelity towards his employer is far too complex to be sifted into an easy formulation applicable to all cases. In my view, each case must be decided on its own facts, taking into account among other factors, the content of the criticism, how confidential or sensitive was the information, the manner in which the criticism was made public, whether the

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[278] See *infra*, this ch., sec. 3(b)(i)c.

[279] *Supra*, note 191, at 64-65.

[280] *Supra*, note 10.

[281] *Ibid.*, at 161.

> statements were true or false, the extent to which the employer's reputation was damaged or jeopardized, the impact of the criticism on the employer's ability to conduct its business, the interest of the public in having the information made public and so forth.

In *MacAlpine*, this analysis was adopted, and the Board considered the factors raised above. The Board concluded first that the criticisms were true in part: while improper pressure had been exerted to grant a licence contrary to the law and the policies of the Ministry, the inference with respect to the complicity of the deputy minister was without justification. The documents and information were not shown to be highly confidential or sensitive. However, the fact that a dispute had developed within the Ministry was regarded as a matter of sensitivity. Although the disclosure had not been made to the public at large, the Board found fault with the grievor's conduct in releasing information and documentation "before attempting to register his protest at a higher level within the Ministry".[282] The Board was similarly critical of the complaint to the OPFA, which it regarded as premature in its timing and "excessive" in its tone and content.

The Board then reiterated its finding that the substance of the grievor's allegation was true, except in relation to the deputy minister, and concluded that, while certain individuals were embarrassed by the disclosures, their reputations could not be equated with that of the employer, the Ministry, which it held to have been unimpaired.

The Board concluded with the following cautionary remarks:[283]

> Nevertheless, we have an important qualification to add. This decision must *not* be taken to mean that any and every difference of opinion within a Ministry may be thrown into the public arena for discussion and resolution. Disclosure of an internal document, if truly confidential, is not justified unless commensurate with the gravity of the occasion or the public need to know. An employee in such circumstances must be prepared to face the consequences of disclosure, including the possibility that his view of the matter will not be upheld. An employee has no duty to conceal wrong-doing, but he does have a duty to be sure of his facts and to exercise good judgment in acting on his knowledge. If an internal avenue of redress or investigation is open to him, the employee must consider whether that alternative is appropriate, not because the truth should be hidden but because the internal remedy may be the most effective. As Mr. Weiler has said, each case must be decided on its own facts, and the initial determination of that question is the responsibility of the employee concerned.

On an application to quash the decision of the Grievance Settlement Board, the Divisional Court held that the Board had not erred in its interpretation of section 10(1) of the *Public Service Act*.[284]

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[282] *Supra*, note 191, at 79.

[283] *Ibid.*, at 83-84.

[284] See *Re The Queen in Right of Ontario and Ontario Public Service Employees Union*, unreported (October 12, 1983, Ont. Div. Ct.), where Madame Justice Van Camp stated simply that "[a] review of the Board's decision does not disclose to us that the Board

Thus, while a literal reading of the oath of secrecy suggests clearly that any disclosure of information obtained in the course of employment is strictly precluded, at least one case has recognized that the duty of confidentiality imposed by the oath is not absolute, and may, in some circumstances, yield to the public interest in disclosure.

ii. Special Oaths of Secrecy

At least eleven statutes[285] require the taking of oaths of secrecy similar to that required under the *Public Service Act*. Certain of the oaths must be taken by persons who are not Crown employees and, hence, are not pertinent to this inquiry. For example, the Ombudsman must swear an oath of secrecy,[286] as must employees of the Legislative Assembly.[287] In certain cases, oaths of secrecy are required of persons who are Crown employees, but are neither civil servants nor public servants. Such is the case for members of the Ontario Labour Relations Board, who must swear not to disclose to any person any of the evidence or any other matter brought before the Board, except in the discharge of their duties.[288]

Of the several special oaths of secrecy, the only one that would seem to apply to civil servants, who, we have seen, are bound by the general oath of secrecy, is that required under the *Statistics Act*.[289] That Act requires that a person cannot "collect, compile, analyse or publish statistical information" under the Act unless he or she takes an oath of office and secrecy, which states

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misconstrued that section". Reference was made briefly to the *MacAlpine* decision in *Re OPSEU (Debenham) and the Crown in Right of Ontario (Ministry of Consumer and Commercial Relations)*, unreported (November 3, 1983, G.S.B., Jolliffe), at 73.

[285] See *Audit Act*, R.S.O. 1980, c. 35, s. 21; *Cancer Remedies Act*, R.S.O. 1980, c. 58, s. 5(3); *Crown Employees Collective Bargaining Act*, *supra*, note 221, s. 38(9); *Labour Relations Act*, R.S.O. 1980, c. 228, ss. 24 and 102(8); *Legal Aid Act*, R.S.O. 1980, c. 234, s. 26(1)(n); *Legislative Assembly Act*, *supra*, note 221, s. 92(1); *Ministry of Treasury and Economics Act*, R.S.O. 1980, c. 291, s. 15; *Ombudsman Act*, R.S.O. 1980, c. 325, s. 13(1); *Private Sanitaria Act*, R.S.O. 1980, c. 391, s. 3(6); *Statistics Act*, R.S.O. 1980, c. 480, s. 4; and *Vital Statistics Act*, R.S.O. 1980, c. 524, s. 55(j).

[286] *Ombudsman Act*, *supra*, note 285, s. 13(1).

[287] *Legislative Assembly Act*, *supra*, note 221, s. 92(1).

[288] See *Labour Relations Act*, *supra*, note 285, ss. 24 and 102(8). See, also, *Crown Employees Collective Bargaining Act*, *supra*, note 221, s. 38(9).

[289] *Supra*, note 285, s. 4. Under s. 55(j) of the *Vital Statistics Act*, *supra*, note 285, regulations may be made "designating the persons who may have access to or may be given information from the records in the Registrar General's office or in a division registrar's office, and prescribing an oath of secrecy to be taken by such persons". Section 67 of the regulations, R.R.O. 1980, Reg. 942, provides that certain classes of person may be given access to or may be given information from the records in the Registrar General's office on condition that the person seeking access has taken an oath of secrecy in a prescribed form. With a single exception — "a representative of Ontario" (s. 67(3)) — the persons in question are not Crown employees.

that information and documents will not be disclosed or given "except as ... may be legally required".[290]

As in the case of the oath required under the *Public Service Act*, the consequences of disclosure in violation of the individual oaths are not specified in the legislation. Presumably, contravention entails the risk of disciplinary measures.

From this brief account, it should be apparent that the existence of special oaths of secrecy is of very limited relevance to our inquiry, as very few Crown employees are subject to them.

(2) Non-Disclosure Provisions

In many cases, the moral obligation to maintain confidentiality, which is created by the general oath of secrecy, is buttressed by a further statutory provision expressly prohibiting disclosure of information and documents. Over one hundred Ontario statutes include provisions of this nature, and many of these statutes create offences for contravention of any of their prescriptions and provide for penalties in the form of a fine or imprisonment.[291] In view of their number, and since these provisions vary with respect to the type of information that must not be communicated, we shall restrict ourselves to a discussion of the general legislative framework. In doing so, we draw heavily on the pioneering research of the Williams Commission.

While there are several kinds of non-disclosure provision, certain types appear to be more prevalent. The most common type of provision is generally cast in the following terms:[292]

> Each person employed in the administration of this Act, including any person making an inquiry, inspection or an investigation ... shall preserve secrecy with respect to all matters that come to his knowledge in the course of his duties, employment, inquiry, inspection or investigation and shall not communicate any such matters to any other person.

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[290] *Statistics Act*, *supra*, note 285, s. 4.

[291] For a general discussion, based on the Ontario statutes in force in 1980, see Williams Commission Report, *supra*, note 266, Vol. 2, at 156-59. A more detailed discussion, based on the Ontario statutes in force as of November, 1979, appears in Brown, *Government Secrecy, Individual Privacy and the Public's Right to Know: An Overview of the Ontario Law* (Research Publication 11, Commission on Freedom of Information and Individual Privacy, 1979), at 21-36.

[292] See, for example, *Ambulance Act*, R.S.O. 1980, c. 20, s. 18(3); *Business Practices Act*, R.S.O. 1980, c. 55, s. 14(1); *Consumer Reporting Act*, R.S.O. 1980, c. 89, s. 18(1); *Denture Therapists Act*, R.S.O. 1980, c. 115, s. 23(1); *Deposits Regulation Act*, R.S.O. 1980, c. 116, s. 6; *Health Disciplines Act*, R.S.O. 1980, c. 196, ss. 41(1), 65(1), 109, and 134; *Mortgage Brokers Act*, R.S.O. 1980, c. 295, s. 25(1); *Public Commercial Vehicles Act*, R.S.O. 1980, c. 407, s. 34; and *Travel Industry Act*, R.S.O. 1980, c. 509, s. 21(1).

To the general duty of secrecy, three exceptions are usually listed,[293] which state the circumstances in which communication is permissible. A person may communicate with respect to matters that come to his attention in the course of his duties (1) when it is required in connection with the administration of the Act and regulations or with any proceedings thereunder, (2) in dealing with his own counsel, or (3) with the consent of the person to whom the information relates.

This form of non-disclosure provision was enacted in response to the proposals in the *Report of the Royal Commission Inquiry into Civil Rights*, popularly known as the "McRuer Report".[294] The McRuer Commission considered this issue in the context of its general examination of statutory powers of investigation, which, it explained, comprehended a variety of powers that might be used to acquire information. In its view, the rights affected by powers of investigation — such as the right to privacy — while not absolute, were "fundamental and should be safeguarded against any unjustified encroachment".[295]

After considering the use of information and evidence obtained through the exercise of these powers, the McRuer Commission recommended that "[t]here should be a statutory prohibition on the communication of information obtained in a statutory investigation beyond the purposes of the relevant statute and the administration of justice".[296]

In 1971, the type of non-disclosure provision quoted above was added to a number of existing statutes[297] and has been incorporated in statutes that since have been enacted.

It should be observed that the breadth of secrecy under this provision is greater than that originally recommended. Whereas the McRuer Commission had recommended that the secrecy of information acquired through the exercise of powers of inquiry should be preserved, this provision is not confined to information gathered pursuant to the exercise of investigative powers, but requires that secrecy be maintained by a person "with respect to all matters that come to his knowledge in the course of his duties, employment, inquiry, inspection or investigation ...". Furthermore, the provision extends to "every person employed in the administration of [the] Act", and thus beyond persons who have access to information that has been obtained through investigation.

Other types of non-disclosure provision appear in the Ontario statutes.

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[293] In certain statutes, there are four exceptions: see, for example, *Business Practices Act*, *supra*, note 292, s. 14(1).

[294] See Ontario, *Royal Commission Inquiry into Civil Rights*, Report No. 1 (1968), Vol. 1, at 385-462.

[295] *Ibid.*, at 387.

[296] *Ibid.*, at 462.

[297] See *The Civil Rights Statute Law Amendment Act, 1971*, S.O. 1971, Vol. 2, c. 50.

Under many licensing statutes, for example, the filing of a financial statement may be compelled, and the confidentiality of these statements is expressly required.[298] Similarly, certain provincial taxation statutes, under which detailed financial and business information must be disclosed to the government, include a secrecy provision.[299] Another class of non-disclosure provision requires the confidentiality of information acquired in the course of conducting a survey, test or examination under statutory authority.[300]

For the purposes of this inquiry, it is not necessary to attempt to analyze the many non-disclosure provisions in greater detail. What is important in the context of this Reference is to note that many Crown employees are under a statutory duty to preserve confidentiality in relation to information that they have acquired in the course of their employment, and that, in some cases, observance of this duty is encouraged not only by the risk of the usual disciplinary measures, but by the fact that contravention has been made an offence, punishable by a fine or imprisonment, or both.

b. Proposals for Change: The Williams Commission Report

In its Report, *Public Government for Private People*, the Williams Commission recommended the enactment of freedom of information legislation conferring on the public a general right of access to government documents, subject to a series of exemptions designed to protect the needs of governmental institutions for confidentiality. The Commission also recommended the establishment of "an independent and authoritative mechanism for reviewing appeals relating to freedom of information requests".[301]

For the purposes of this Reference, we need not review the Williams Commission's resolution of the many substantive and procedural issues that are canvassed in its Report. Our concern is more narrow, and relates to the approach that was taken to the legislation bearing upon the duty of confidentiality resting on Crown employees.

With respect to the oath of secrecy required by section 10 of the *Public Service Act*, the Williams Commission formed the view that "the continued use of this oath of secrecy would significantly undermine successful implementation of freedom of information legislation."[302] This followed from its conclusion that "the oath of secrecy has an inhibiting effect on the willingness of public servants to disclose information".[303] Indeed, it was thought that, even with the enactment of freedom of information legislation clearly establishing guidelines for disclosure, the oath would preserve "an atmosphere" that, in cases of doubt, might persuade public servants to err on the side of secrecy. That the balance possibly might be weighed in favour of secrecy was regarded as entirely inconsistent with the underlying philosophy of the proposed freedom of information legislation, which would establish a general statutory presumption in favour of public access to government information.[304]

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[298] See, for example, *Collection Agencies Act*, R.S.O. 1980, c. 73, s. 21(3) and (4); *Motor Vehicle Dealers Act*, R.S.O. 1980, c. 299, s. 18; and *Real Estate and Business Brokers Act*, R.S.O. 1980, c. 431, s. 21(4) and (5).

[299] See, for example, *Corporations Tax Act*, R.S.O. 1980, c. 97, s. 91; *Gasoline Tax Act*, R.S.O. 1980, c. 186, s. 30, as am. by S.O. 1985, c. 24, s. 9; *Income Tax Act*, R.S.O. 1980, c. 213, s. 46; *Retail Sales Tax Act*, R.S.O. 1980, c. 454, s. 15; and *Tobacco Tax Act*, R.S.O. 1980, c. 502, s. 22, as am. by S.O. 1984, c. 4, s. 5(a) and (b).

[300] See, for example, *Building Code Act*, R.S.O. 1980, c. 51, s. 23; *Environmental Protection Act*, R.S.O. 1980, c. 141, s. 130; *Occupational Health and Safety Act*, R.S.O. 1980, c. 321, s. 34; and *Pesticides Act*, R.S.O. 1980, c. 376, s. 19.

[301] Williams Commission Report, *supra*, note 266, at 236.

Accordingly, the Williams Commission recommended that "[t]he practice of requiring public servants to suscribe to the broad oath of secrecy in section 10 of *The Public Service Act* should be discontinued."[305]

With respect to the statutory non-disclosure provisions, a somewhat different approach was taken. While recognizing that simply allowing these provisions to remain in force along with the proposed freedom of information legislation would undermine the efficacy of the latter, the Williams Commission did not recommend their repeal. It was of the view that such provisions might be useful in clarifying the position where the applicability of the proposed freedom of information legislation is uncertain, subject, however, to the *caveat* that these provisions must be consistent with the philosophy underlying the freedom of information scheme. From our earlier discussion, it is apparent that many of these provisions are so broad that, if left intact, they would impair the effectiveness of the freedom of information legislation.[306]

The Williams Commission made three recommendations that sought to reconcile its recognition of the utility of certain non-disclosure provisions with its concern for their possibly restrictive effect. First, it recommended that there should be an exemption for information that is to be kept secret under other statutes.[307] Secondly, it recommended that there should be a review by a committee of the Legislative Assembly of the statutory secrecy provisions in force when the freedom of information legislation is enacted, which would have as its purpose either repeal of unnecessary provisions or amendment of necessary provisions "to accord with the general approach to confidentiality adopted in the freedom of information law".[308] In order to encourage an expeditious review, it was further recommended that, unless the statutory provisions had been reaffirmed by the Legislative Assembly within two years of the enactment of the freedom of information legislation, they should be deemed to expire.[309]

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[302] *Ibid.*, at 400.

[303] *Ibid.*, at 399. See, also, *ibid.*, at 155.

[304] *Ibid.*, at 400.

[305] *Ibid.*, at 401.

[306] *Ibid.*, at 308-09.

[307] The Commission recommended (*ibid.*, at 311) that the exemption be cast in the following terms:

> Government institutions are not required to disclose information specifically exempted from disclosure by statute, provided that such statute (a) requires that the matter be withheld from the public in such a manner as to leave no discretion in the issue, or (b) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

See discussion *ibid.*, at 310-11.

c. *Administrative Guidelines Affecting the Duty of Confidentiality*

Following the submission of the Williams Commission Report, the government announced that the then Premier of Ontario, the Honourable William G. Davis, had written to all Cabinet members with respect to the commitment of his Cabinet "to greater openness in the administration of government and increased access to the government by citizens."[310] In his letter, the Premier stated that, in the interim period prior to the enactment of freedom of information legislation, in furtherance of the policy of "open government", efforts should be made "to encourage open and responsive behaviour among public servants in their daily dealings with the public, particularly including Members of the Legislative Assembly and representatives of the news media".

It was stated that, while Ministers bear responsibility for the operations of their Ministries, the responsibility for communicating with the public is a duty that, of necessity, must be delegated to public servants. In order to ensure that public servants follow a consistent policy "in the spirit of Freedom of Information" in performing this task, the Cabinet agreed on certain guidelines, which were appended to the Premier's letter.

These guidelines stated as follows:

> 1. The basic communications position of the Government of Ontario is to be 'open' as opposed to 'closed' in its dealings with the public.
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> 2. Members of the Civil Service have a duty and a responsibility to communicate with the public, including particularly Members of the Legislative Assembly and representatives of the news media.
>
> 3. While the staff function and support of communications efforts in Ministries is the responsibility of Ministry communications personnel, program managers should be prepared to explain and describe programs and policies for which they are responsible and which have been announced or implemented by the government, and to assist wherever possible in helping members of the public obtain additional information.

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[308] *Ibid.*, at 310.

[309] *Ibid.*, at 311.

[310] The Premier's letter (dated October 3, 1980), to which was appended "Policy Guidelines for Civil Servants: Communications with the Public", was tabled in the Legislative Assembly by the Hon. Alan W. Pope, then Minister without Portfolio: see *Ont. Leg. Ass., Sessional Papers* 314/215 (October 9, 1980).

4. Ministerial responsibility will result in queries on policy and policy alternatives being restricted to Ministers while civil servants will restrict themselves to factual information. It is not appropriate for civil servants to discuss advice or recommendations tendered to Ministers, or to speculate about policy deliberations or future policy decisions.

5. It will be normal for civil servants to be interviewed by the media in regard to factual information and to be quoted by name in regard to such interviews.

6. Civil servants acting in good faith under these guidelines will not be considered as having violated their oaths of secrecy.

7. Nothing in these guidelines authorizes the disclosure of information which is specifically prohibited from disclosure by law, nor do they authorize the disclosure of information which would jeopardize enforcement proceedings, security, Cabinet confidentiality, individual privacy or confidentiality of commercial information supplied to the government on a confidential basis.

d. The Proposed Freedom of Information and Protection of Individual Privacy Act, 1986

In April, 1986, the Legislative Assembly gave Second Reading to Bill 34, the proposed *Freedom of Information and Protection of Individual Privacy Act, 1986.*[311] The Bill implements many of the recommendations of the Williams Commission. At this juncture, we wish to discuss only those provisions that bear upon the duty of confidentiality of Crown employees. We shall consider the Bill in greater detail elsewhere in this Report.[312] For purposes of this discussion, however, we need only note that, consistent with the proposals of the Williams Commission, the Bill would establish a general right of access to records, subject to a series of exemptions that recognize countervailing interests in confidentiality.

Turning first to the oath of office and secrecy, the Bill departs from the Williams Commission Report by recommending that it be retained in an amended form.[313] Pursuant to the proposed amendment, the oath would state that, "except ... as may be legally *authorized or* required", information and documents are not to be disclosed.[314] Presumably, the purpose of this amendment is to facilitate the delegation to civil servants of the responsibility of responding to requests for access under the legislation. The Bill provides expressly that a power or duty may be delegated by the "head"[315] to an

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[311] *Supra*, note 100.

[312] See *infra*, ch. 6, sec. 7(c).

[313] *Supra*, note 100, s. 62.

[314] Emphasis added. It will be recalled that this was the original language of the oath: see text accompanying note 267, *supra*.

[315] Section 2 defines "head" in respect of an institution to mean "(a) in the case of a ministry, the minister of the Crown who presides over the ministry, and (b) in the case of any other institution, the person designated as head of that institution in the regulations."

"officer"[316] or officers of the institution, subject to such limitations, restrictions, conditions and requirements as the head may prescribe.[317]

With respect to the statutory non-disclosure provisions, Bill 34 implements the recommendations of the Williams Commission in part. The Bill does not include an exemption for information that must be kept confidential pursuant to other statutes. However, it does require a comprehensive review, to be undertaken by the Standing Committee on Procedural Affairs (now the Standing Committee on the Legislative Assembly), of all confidentiality provisions in existence on the day that the Act comes into force. The purpose of the review is to make recommendations to the Legislature regarding the repeal of unnecessary or inconsistent provisions and the amendment of provisions that do not conform to the purposes of the Act.[318] Whereas the Williams Commission had recommended that the secrecy provisions should be deemed to expire two years after the enactment of the freedom of information statute, Bill 34 provides that, two years after the section requiring the legislative review comes into force, the proposed *Freedom of Information and Protection of Individual Privacy Act, 1986* will prevail over a confidentiality provision in any other Act unless that Act specifically provides otherwise.[319]

(ii) Federal Legislation

Crown employees in Ontario and elsewhere in Canada are subject to the *Criminal Code*[320] and to the *Official Secrets Act*,[321] under which an unauthorized disclosure of information may lead to the imposition of criminal liability. We shall first discuss the *Criminal Code*.

a. Criminal Code

Section 111 of the *Criminal Code* provides that "[e]very official who, in connection with the duties of his office, commits fraud or a breach of trust is guilty of an indictable offence and is liable to imprisonment for five years, whether or not the fraud or breach of trust would be an offence if it were committed in relation to a private person". While there is no authority directly on the issue, it would appear that an unauthorized disclosure by a provincial Crown employee of information that he is under a duty not to reveal might be regarded as a breach of trust in violation of the section.[322]

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[316] "Officer" is not a defined term.

[317] *Supra*, note 100, s. 58(1).

[318] *Ibid.*, s. 60(1).

[319] *Ibid.*, s. 60(2) and (3).

[320] *Supra*, note 85.

[321] *Supra*, note 86.

[322] Section 111 applies to provincial Crown employees by virtue of the definitions of "official", "office", and "government" in s. 107, which apply to Part III of the *Criminal Code*, "Offences Against the Administration of Law and Justice". The term "official" is defined to mean "a person who (a) holds an office, or (b) is appointed to discharge a public duty". "Office" is defined to include "(a) an office or appointment

In *Wright v. The Queen*,[323] the Supreme Court of Canada took the view that disclosure of information by an Ontario Provincial Police constable that he was bound to keep confidential would be a criminal breach of trust at common law[324] and suggested that it would also be a violation of section 103 of the *Criminal Code*,[325] which was the predecessor to section 111, and identical to it in language.

In *R. v. Campbell*,[326] the Ontario Court of Appeal considered the meaning of section 103. The Court was unanimous in holding that, under the section, there need not be a breach of trust in relation to trust property; a breach of trust in relation to the duties of office was sufficient to contravene the section. In the reasons for judgment of Mr. Justice Wells, which, on appeal, were approved expressly by the Supreme Court of Canada,[327] the meaning of the section was elaborated further. Wells J.A. held that the provision was to be read to comprehend "any breach of the appropriate standard of responsibility and conduct"[328] required of a person by the nature of his or her particular office. He stated that section 103 was intended to cover the common law offence of misbehaviour or malfeasance in office.[329]

These cases suggest that, to the extent that a Crown employee is under a duty of confidentiality, an unauthorized disclosure of information may be considered to be a breach of trust risking prosecution and conviction under the *Criminal Code*.

b. Official Secrets Act

By virtue of the *Official Secrets Act*,[330] an unauthorized disclosure of information by a provincial government employee may lead to criminal liability.[331] The Act makes the wrongful communication of information a criminal

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under the government, (b) a civil or military commission, and (c) a position or employment in a public department". Finally, "government" is defined to mean "(a) the Government of Canada, (b) the government of a province, or (c) Her Majesty in right of Canada or in right of a province".

[323] [1964] S.C.R. 192, 43 D.L.R. (2d) 597.

[324] Fauteux J., who delivered the judgment of the Court, quoted Lord Mansfield in *R. v. Bembridge* (1783), 3 Dougl. 327, 99 E.R. 679:

> [A] man accepting an office of trust concerning the public, especially if attended with profit, is answerable criminally to the King for misbehaviour in his office....

[325] S.C. 1953-54, c. 51.

[326] [1967] 2 O.R. 1, 3 C.C.C. 250 (C.A.) (subsequent references are to [1967] 2 O.R.).

[327] (1967), 2 C.R.N.S. 403 (S.C.C.) (*per* Cartwright C.J.C.).

[328] *Supra*, note 326, at 6.

[329] See *R. v. Bembridge*, *supra*, note 324.

[330] *Supra*, note 86.

[331] Section 4(1)(a) of the *Official Secrets Act*, which deals with disclosure of information, applies to "a person who holds or has held office under Her Majesty". Section 2(1) of

offence, punishable upon conviction by imprisonment for a term not to exceed fourteen years. Under the Act, a prosecution cannot be brought except by or with the consent of the Attorney General of Canada, although a person charged with an offence under the Act may be arrested under warrant or otherwise, and may be remanded in custody or on bail.[332]

The *Official Secrets Act* is directed to two distinct, albeit related, concerns: espionage and related activity prejudicial to the safety or interests of the State; and the wrongful communication of, and other improper conduct with respect to, government information.[333] While the purpose of the Act may be popularly understood to be the prevention and suppression of foreign espionage, in the United Kindgom, the *Official Secrets Act* has been used to prosecute civil servants who have disclosed information without proper authorization; a notable recent example was the prosecution of Mr. Clive Ponting in connection with the "Belgrano Affair".[334]

Section 4(1)(a) relates to the communication of information, providing as follows:

> 4.-(1) Every person is guilty of an offence ... who, having in his possession or control any secret official code word, or pass word, or any sketch, plan, model, article, note, document or information that ... has been entrusted in confidence to him by any person holding office under Her Majesty, or that he has obtained or to which he has had access ... owing to his position as a person who holds or has held office under Her Majesty...
>
> (a) communicates the code word, pass word, sketch, plan, model, article, note, document or information to any person, other than a person to whom he is authorized to communicate with, or a person to whom it is in the interest of the State his duty to communicate it ....

Inherent in this provision is an important ambiguity, which leaves uncertain the extent to which individuals are restricted in their ability to disclose information without risking a contravention of the Act. There is a question as to the type of information that must not be communicated. In particular, it is unclear whether the information must be "secret official" information for there

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the Act defines "office under Her Majesty" to include "any office or employment in or under any department or branch of the government of Canada or of any province, and any office or employment in, on or under any board, commission, corporation or other body that is an agent of Her Majesty in right of Canada or any province".

[332] *Supra*, note 86, s. 12.

[333] For a history of the Act, see Canada, Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *First Report — Security and Information* (1979) (hereinafter referred to as "McDonald Commission Report"), paras. 3-19, at 3-8. Its discussion was drawn from Friedland, *National Security: The Legal Dimensions* (1980), at 31-37.

[334] See *infra*, ch. 4, sec. 3(b)(i).

to be a violation. The problem is explained in the following excerpt from the Williams Commission Report:[335]

> What kind of information is caught by the section? There are two possible interpretations of section 4: either the words 'secret official' apply to all of the following words, including 'sketch, plan ... document or information,' or they only modify the phrase 'code word or pass word.' If the first interpretation is correct, then it is said that the act forbids only the disclosure of information which is classified as 'top secret' or 'secret.' On the other hand, if 'secret official' modifies only 'code word or pass word,' and does not refer to the remaining 'sketch, plan ... document or information,' then the unauthorized disclosure of any information, including official information of a provincial government, no matter how insignificant, could be an offence under the act. This is the interpretation which has been followed in the British courts, but the issue remains in doubt in Canada. The requirement of consent from the Attorney General of Canada to initiate prosecutions under the act provides the only brake on prosecutions for trivial breaches.

Depending on how this issue is resolved, section 4 of the *Official Secrets Act* may proscribe all unauthorized communication of information, except where such communication is in the interest of the State. This provision is capable of a literal interpretation that is so broad as to result in criminal liability in circumstances where it is unnecessary, and possibly inimical to the efficient operation of government.[336]

Because of its expansive and ambiguous language, and the serious implications of a contravention, there have been calls for the revision of the *Official Secrets Act*,[337] a notable recent example being that of the 1979 Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police.[338] Since our primary concern in this chapter has been to describe the present law governing Crown employees in Ontario, we shall defer our review of its proposals respecting disclosure of information until our general discussion of the federal legislation bearing upon confidentiality, which appears in chapter 4.

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[335] *Supra*, note 266, Vol. 2, at 167-68.

[336] See McDonald Commission Report, *supra*, note 333, at 23.

[337] See Canada, *Report of the Royal Commission on Security* (1969). See, also, Canada, *The Report of the Royal Commission Appointed under Order in Council P.C. 411 of February 5, 1946 to investigate the Facts Relating to and the Circumstances Surrounding the Communication, By Public Officials and Other Persons in Positions of Trust of Secret and Confidential Information to Agents of a Foreign Power* (1946). The former is known as the "Mackenzie Report" and the latter as the "Taschereau-Kellock Report". For a brief discussion, see Friedland, *supra*, note 333, at 30-31.

[338] *Supra*, note 333.

4. THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

(a) INTRODUCTION

Any discussion of the law governing political activity and public comment by Crown employees would be seriously deficient if it did not address the *Canadian Charter of Rights and Freedoms*.[339] The Charter is part of the "supreme law of Canada", and any law that is inconsistent with its provisions may be declared to be of no force and effect.[340] Accordingly, the restrictions relating to political activity, public criticism of government policy, and disclosure of government information to which Crown employees are subject under the *Public Service Act*[341] must be re-evaluated according to the standards prescribed by the Charter.

The Charter guarantees the rights and freedoms set out in it, including, in section 2, the fundamental freedoms of expression and association,[342] and, in section 3, the democratic right of membership in the House of Commons or a legislative assembly.[343] The Charter also guarantees, in section 15, the right of every individual to equal protection before and under the law without discrimination.[344]

These rights and freedoms are not, however, absolute. Section 1 of the Charter provides that all of the rights and freedoms of the Charter may be subject to limitations, provided they are "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Further, certain rights and freedoms guaranteed by the Charter may be expressly abrogated by Parliament or a provincial legislature pursuant to section 33 of the Charter.[345]

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[339] *Supra*, note 1.

[340] *Ibid.*, s. 52(1).

[341] *Supra*, note 83.

[342] Section 2 provides:

> 2. Everyone has the following fundamental freedoms:
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> (a) freedom of conscience and religion;
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> (c) freedom of peaceful assembly; and
>
> (d) freedom of association.

[343] Section 3 provides:

> 3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

[344] Section 15 provides:

> 15.-(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

It is already apparent that limitations on political activities by Crown employees will be subject to judicial scrutiny in light of the Charter. Some of the *Public Service Act*[346] limitations discussed in this chapter have already been the subject of a constitutional challenge alleging violation of the Charter. In *Re Ontario Public Service Employees Union and Attorney-General for Ontario*,[347] the Supreme Court of Canada, on leave to appeal, agreed to consider, *inter alia*, the following constitutional questions:[348]

> 2. Do Sections 12, 13, 14, 15 and 16 of the *Public Service Act*, R.S.O. 1970, c. 386, as amended, infringe or deny the rights and freedoms guaranteed by Sections 2, 3 and/or 15(1) of the Canadian *Charter of Rights and Freedoms* insofar as they purport to restrain provincial Civil Servants and Crown Employees from engaging in certain federal and provincial political activity?
>
> 3. If Sections 12, 13, 14, 15 and 16 of the *Public Service Act*, R.S.O. 1970, c. 386, as amended, infringe or deny Sections 2, 3 and/or 15(1) of the Canadian *Charter of Rights and Freedoms*, are these Sections justified by Section 1 of the Canadian *Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act*, 1982?

In March 1986, on the hearing of the appeal, the Supreme Court decided that it would not hear or decide the arguments based on the Charter. The Court gave no reasons for its decision. However, the refusal appears to have been related to procedural, rather than substantive, issues.[349]

Challenges to limitations on political activities by federal public employees have also been initiated on the basis of the Charter in the Federal Court of Canada.[350] The plaintiffs in each case have alleged that restrictions on political activity imposed by section 32(1) of the federal *Public Service Employment Act*,[351] which prohibits an employee from engaging in work for, on behalf of or against a candidate for election or a political party, unreasonably limit their guaranteed freedoms of expression and association.

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[345] Section 33 applies to s. 2 and to ss. 7-15 of the Charter; the democratic and mobility rights (ss. 3-6) are not subject to abrogation. Because of the obvious political implications of a wholesale infringement of fundamental rights and freedoms, it is expected that Parliament and the legislative assemblies will invoke the s. 33 "override" only in extreme circumstances.

[346] *Supra*, note 83.

[347] (1979), 24 O.R. (2d) 324, 98 D.L.R. (3d) 168 (H.C.J.), aff'd (1980), 31 O.R. (2d) 321, 118 D.L.R. (3d) 661 (C.A.), leave granted to appeal to the Supreme Court of Canada.

[348] Appellants' Supplementary Factum, at 1-2. The first question dealt with the issue of the jurisdictional competence of the Province to legislate with respect to federal elections; this was not a Charter issue.

[349] It appears that the Court's refusal related to its procedure for setting constitutional questions. The Charter arguments had not been raised at either the trial or the appeal level.

[350] Three actions have been brought by federal employees alleging limitiations on freedom

Finally, in the recent decision of *Fraser v. the Attorney General of Nova Scotia*,[352] the Nova Scotia Supreme Court, Trial Division, found section 34(2) and (3) and section 35(c) of the *Civil Service Act*,[353] which govern political activity by Nova Scotia public employees, to be inconsistent with the Charter and of no force and effect.[354]

It seems clear, therefore, that the validity of both existing and prospective legislative limitations on expression and political activity by public employees will be judged in the light of the standards established by the Charter. The Supreme Court of Canada has not yet had an opportunity to consider the meaning or scope of many of the rights and freedoms guaranteed by the Charter, and, accordingly, the jurisprudence that interprets and applies this standard is still at a very rudimentary stage. We can, nevertheless, gain some guidance from the general interpretive approach that has been articulated by the Court in determining the application of the Charter.[355]

(b) GENERAL INTERPRETIVE APPROACH TO THE CHARTER

The Supreme Court of Canada, on several occasions, has advocated a liberal approach to the interpretation of the rights and freedoms guaranteed by the Charter.[356] The Court has identified the purpose of the Charter to be "the

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of expression, association and the right of candidacy: *Osborne v. the Queen*, Court File No. T-1226-84; *Millar v. the Queen*, Court File No. T-1239-84; and *Barhart, Camponi, Cassidy, Clavette and Stevens v. the Queen and the Public Service Commission*, Court File No. T-1636-84. The trial of these actions proceeded jointly in the Federal Court in April 1986.

[351] R.S.C. 1970, c. P-32. Section 32(1) provides:

> 32.-(1) No deputy head and, except as authorized under this section, no employee, shall
>
> (a) engage in work for, on behalf of or against a candidate for election as a member of the House of Commons, a member of the Council of the Yukon Territory or the Northwest Territories, or engage in work for, on behalf of or against a political party; or
>
> (b) be a candidate for election as a member described in paragraph (a).

[352] Unreported (June 10, 1986, N.S.S.C., T.D.).

[353] S.N.S. 1980, c. 3.

[354] This decision is discussed in greater detail *infra*, this ch., sec. 4(e).

[355] Canadian courts can also be expected to look to American constitutional jurisprudence for guidance in interpreting and applying the guaranteed rights and freedoms of the Charter. The American decisions relating to political activity and public comment by public employees are considered *infra*, ch. 4, secs. 4(a)(ii) and 4(b)(iii).

[356] *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at 155, (1984), 11 D.L.R. (4th) 641 (subsequent references are to [1984] 2 S.C.R.); *R. v. Big M Drug Mart Ltd.*, [1985] 1

unremitting protection of individual rights and liberties,"[357] and it has emphasized that the Charter is intended to set a standard against which present as well as future legislation is to be tested. Accordingly, the Charter is subject to "distinctive principles of constitutional interpretation appropriate to expounding the supreme law of Canada".[358] The Court has cautioned that a "[n]arrow and technical interpretation, if not modulated by a sense of the unknowns of the future, can stunt the growth of the law and hence the community it serves."[359]

This basic interpretive approach to the Charter was established in *Hunter v. Southam Inc.*,[360] wherein Dickson C.J.C. articulated the rationale for adopting a broad perspective in interpreting constitutional documents:[361]

> The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.
>
> The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts 'not to read the provisions of the Constitution like a last will and testament lest it become one'.

In *R. v. Big M Drug Mart Ltd.*, the Chief Justice reiterated the importance of adopting a generous, rather than a legalistic, approach, while at the same time cautioning that the Charter must "be placed in its proper linguistic, philosophic and historic contexts".[362]

With the foregoing general principles of interpretation in mind, we now turn to consider the approach taken by the Court in determining whether there has been an infringement of a guaranteed right or freedom.

S.C.R. 295, at 346, (1985), 18 D.L.R. (4th) 321 (subsequent references are to [1985] 1 S.C.R.); *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, at 365, (1984), 9 D.L.R. (4th) 161, at 168 (subsequent references are to [1984] 1 S.C.R.).

[357] *Hunter v. Southam Inc.*, *supra*, note 356, at 155.

[358] *R. v. Big M Drug Mart Ltd.*, *supra*, note 356, at 344.

[359] *Law Society of Upper Canada v. Skapinker*, *supra*, note 356, at 366.

[360] *Supra*, note 356.

[361] *Ibid.*, at 155.

[362] *Supra*, note 356, at 344.

(c) THE DETERMINATION OF AN INFRINGEMENT OF A GUARANTEED RIGHT OR FREEDOM

The first step in any Charter inquiry is to determine whether a guaranteed right or freedom has been infringed. It is only following this determination that the issue of whether a justification exists under section 1 will arise.

The Court has indicated that the meaning of a right or freedom guaranteed by the Charter must be ascertained by an analysis of the purpose of the guarantee; that is, the right or freedom must be understood in light of the interests it was intended to protect. The Chief Justice has stated:[363]

> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*.

The Supreme Court of Canada has not yet had occasion to consider either freedom of expression or freedom of association, fundamental freedoms that may be infringed by provisions governing political activity and public comment under the *Public Service Act*. However, the concept of freedom in general terms has been considered, in the context of freedom of religion, in *Big M Drug Mart Ltd.*, wherein the Chief Justice stated:[364]

> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the State or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. *Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices.* Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

In the same judgment, the Chief Justice reminded us that an emphasis on individual judgment lies at the heart of our democratic political tradition and that the ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government.[365] He continued:

> It is because of the centrality of the rights associated with freedom of individual

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[363] *R. v. Big M Drug Mart Ltd., supra*, note 356, at 344.

[364] *Ibid.*, at 336-37 (emphasis added).

[365] *Ibid.*, at 346.

conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or 'firstness' of the First Amendment. It is this same centrality that in my view underlies their designation in the *Canadian Charter of Rights and Freedoms* as 'fundamental'. They are the *sine qua non* of the political tradition underlying the *Charter*.

(d) ARE FUNDAMENTAL RIGHTS OR FREEDOMS INFRINGED BY RESTRICTIONS ON POLITICAL AND CRITICAL COMMENT AND/OR POLITICAL ACTIVITY?

The Supreme Court of Canada appears to be committed to adopting a liberal approach to the interpretation of the Charter. Nevertheless, the nature and meaning of such concepts as expression, association and equality are not unambiguous, but rather are capable of a variety of interpretations, some of which could narrow the application of the Charter protections.

(i) Freedom of Expression: Section 2(b)

Section 2(b) of the Charter provides as follows:

> 2. Everyone has the following fundamental freedoms:
>
> . . . .
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

The current restrictions imposed by the *Public Service Act* limit various forms of expression in a variety of ways. The first, and most broadly cast, limitation on freedom of expression is the oath of secrecy, prescribed by section 10(1) of the Act. As we have discussed, the meaning of the oath is very unclear and, on a literal reading, it appears to prohibit any and all communication of information that has been acquired in the course of employment by civil servants.[366] Section 14 of the Act further prohibits Crown employees from expressing their views on "any matter that forms part of the platform of a political party", while section 13 limits their freedom to canvass or solicit funds, activities that necessarily involve the expression of views and the communication of information.

In determining whether these forms of expression fall within the protection of section 2(b) of the Charter, it is necessary, applying the general interpretive approach advocated by the Supreme Court in *Big M Drug Mart Ltd.*, to consider the purpose of the guarantee of freedom of expression in light of the interests it was intended to protect. Arguably, vigorous discussion and free exchange of information, ideas, and opinions on matters of public interest and politics are central to a free society and democratic system of self-government. Accordingly, it may be strongly argued that the type of expression that is currently restricted by sections 10 and 14 of the *Public Service Act*, touching as it does on matters of political and public concern, is central to the concept of freedom of expression.[367] It seems likely, therefore, that a court would find that these limitations constitute an infringement of the fundamental freedom of expression.[368]

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[366] See discussion *supra*, this ch., sec. 3(b)(i)a.(1).

(ii) Freedom of Association: Section 2(d)

The existing limitations on political activity may also be impugned as an infringement of freedom of association guaranteed by section 2(d) of the Charter, which provides as follows:

> 2. Everyone has the following fundamental freedoms:
>
> . . . .
>
> (d) freedom of association.

It will be recalled that section 12(1)(b) of the *Public Service Act* prohibits a Crown employee from soliciting funds for a federal or provincial political party or candidate, except during a leave of absence for candidature. In addition, under section 13 of the Act, civil servants are prohibited from canvassing on behalf of a candidate during a federal or provincial election, and deputy ministers and Schedule 2 employees are prohibited from canvassing on behalf of or otherwise actively working in support of a provincial or federal political party or candidate at any time.

It may be argued that freedom of association means little if it does not include the freedom to work actively in pursuit of the goals of the association through such conduct as canvassing or soliciting funds. However, as the cases discussed below indicate, there is some uncertainty concerning whether freedom to partake in the activities proscribed by the *Public Service Act* is included in the concept of "association".

Although the Supreme Court of Canada has not yet interpreted the meaning or scope of freedom of association, the concept has been considered by several lower courts, in the context of labour disputes involving trade unions. These courts are divided in their views, some interpreting the concept of "association" narrowly, and others giving it a broad interpretation. The alternative positions have been most clearly stated in *Dolphin Delivery Ltd. v. Retail, Wholesale and Department Store Union, Local 580*[369] and *Re Service*

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[367] Arguments may arise, however, as to whether certain types of expression, such as commercial speech, warrant constitutional protection. See discussion in Beckton, "Freedom of Expression", in Tarnopolsky and Beaudoin (eds.), *The Canadian Charter of Rights and Freedoms: Commentary* (1982) (hereinafter referred to as "Commentary") 75, at 115-18.

[368] For a labour arbitration case in which the Charter has been applied with respect to public criticism of a public employer by an employee, see *Re Simon Fraser University and Association of University and College Employees, Local 2* (1985), 18 L.A.C. (3d) 361 (Bird).

[369] (1984), 52 B.C.L.R. 1, 10 D.L.R. (4th) 198 (C.A.) (subsequent references are to 10 D.L.R. (4th)).

Employees' International Union, Local 204 and Broadway Manor Nursing Home.[370]

In *Dolphin Delivery Ltd.*,[371] the British Columbia Court of Appeal adopted a narrow view of "association", holding that laws restricting picketing by trade unions did not infringe the guarantee of freedom of association under the Charter. Esson J.A. held that, in considering the scope of the guaranteed freedoms, resort should be had to liberal rules of statutory interpretation only where there is uncertainty or ambiguity in the words of the Charter. He argued that this ordinary rule of construction may be of greater importance in relation to the Charter than in relation to other statutes since "[i]f problems are created by overexpansive judicial interpretation, they cannot be readily remedied by amendment as they can in the case of a statute".[372] In his view, the word "association" raised no such uncertainty or ambiguity, and limitations on picketing did not breach the guarantee of freedom of association "for the simple reason that the activity described as picketing is not within any known meaning of the word 'association' ".[373]

In arriving at this conclusion, Esson J.A. relied on *Collymore v. A.G. Trinidad and Tobago*,[374] wherein the Privy Council had refused "to equate freedom to associate with freedom to pursue without restriction the objects of the association".[375] In *Collymore*, declaring that the challenged legislation did not infringe the freedom of association, Lord Donovan approved the following reasoning of the Court of Appeal of Trinidad and Tobago:[376]

> In my judgment, then, freedom of association means no more than freedom to enter into consensual arrangements to promote the common interest objects of the associating group. The objects may be any of many. They may be religious or social, political or philosophical, economic or professional, educational or cultural, sporting or charitable. But the freedom to associate confers neither right nor licence for a course of conduct or for the commission of acts which in the view of Parliament are inimical to the peace, order and good government of the country.

Esson J.A. adopted the reasoning of the Privy Council and expressly rejected the argument that unless the right to bargain collectively and to strike were guaranteed, the right of association would, for a trade union, have no content and no value. He observed:[377]

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[370] (1983), 44 O.R. (2d) 392, 4 D.L.R. (4th) 231 (Div. Ct.), aff'd on other grounds (1985), 48 O.R. (2d) 225, 13 D.L.R. (4th) 220 (C.A.).

[371] *Supra*, note 369.

[372] *Ibid.*, at 209.

[373] *Ibid.*, at 208. By way of *obiter*, he also stated that neither the right to bargain collectively nor the right to strike could be brought within the "ordinary meaning" of association.

[374] [1970] A.C. 538, [1969] 2 All E.R. 1207 (P.C.) (subsequent references are to [1970] A.C.). In that case, legislation that abridged the right to bargain collectively and to strike had been challenged on the ground that it infringed the right of freedom of association guaranteed by the Constitution of Trinidad and Tobago.

[375] *Ibid.*, at 547.

[376] *Ibid.*

> That is, I suggest, an excessively narrow view of the significance of the freedom of association. It disregards the fact that large numbers of individuals, acting in concert, can influence events in ways and to an extent that would not be possible without association. That is particularly true in the political field. The freedom of association in s. 2, in combination with the individual right to vote in s. 3 and the requirement in s. 4 that elections be held within five years, is a potent combination; one which must be reckoned with by any government which contemplates legislating to limit the existing rights of trade unions.

This narrow interpretation of the concept of association has been adopted by several other Canadian courts.[378]

The Ontario Divisional Court took the opposite view in *Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home*.[379] In that case, the Court held that freedom of association must include freedom to engage in conduct that is reasonably consonant with the lawful objects of an association. Galligan J. characterized the purpose of an association of workers to be the advancement of their common interests, and observed that, as a practical matter, their association would be barren and useless if they were not free to take such lawful steps as they considered reasonable to advance those interests, including the freedom to bargain and strike. Smith J. agreed that freedom of association included the freedom to pursue the lawful objects and activities essential to an association's purposes and that, as a matter of interpretation, the freedom of association should be construed as an absolute, not a qualified, freedom, subject only to such limitations as those established by section 1.[380]

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[377] *Dolphin Delivery Ltd. v. Retail, Wholesale and Department Store Union, Local 580, supra*, note 369, at 211.

[378] See *Public Service Alliance of Canada v. The Queen in the Right of Canada* (1984), 11 D.L.R. (4th) 387, 11 C.R.R. 97 (F.C.A.), holding that the right to bargain collectively does not come within s. 2(d); *Reference re Public Service Employee Relations Act, Labour Relations Act and Police Officer's Collective Bargaing Act* (1984), 35 Alta. L.R. (2d) 124, 16 D.L.R. (4th) 359 (C.A.), holding that s. 2(d) does not include the right to strike; and *Halifax Police Officers and NCO's Association v. City of Halifax* (1984), 64 N.S.R. (2d) 368, 11 C.R.R. 358, (S.C., T.D.), holding that limitations on collective bargaining do not contravene s. 2(d).

[379] *Supra*, note 370.

[380] In *Re Retail, Wholesale & Department Store Union, Locals 544, 496, 635 and 955 and Government of Saskatchewan* (1985), 19 D.L.R. (4th) 609, [1985] 3 W.W.R. 110 (Sask. C.A.) (subsequent reference is to 19 D.L.R. (4th)), Cameron J.A. adopted a somewhat narrower position. He maintained that freedom of association cannot be equated with freedom to pursue without restriction the objects of the association; rather, some of the means by which a trade union pursues its objectives are constitutionally protected, while others are not. He held that the right to strike is a protected means because it is essential to collective bargaining, in that "without it there would be little left of the freedom of employees to act as one in their dealings with their employer" (*ibid.*, at 644).

If a narrow approach were adopted to the question whether the current Ontario restrictions on canvassing and the solicitation of funds contravene section 2(d) of the Charter, it might be argued that, because these restrictions are merely means of pursuing the objects of the association, and because objects are not protected by the Charter, they do not constitute an infringment of freedom of association. However, such an interpretation arguably does not take proper account of the purpose of the guarantee of freedom of association and the interests it was designed to protect. Association, like expression, is a basic and absolute prerequisite to a democratic political system. As one commentator has observed:[381]

> Freedom of association is, in many ways, the most comprehensive, if not the most fundamental of the fundamental freedoms. More than a hundred years ago Alexis de Tocqueville observed that 'among the laws which govern human societies, there is one which appears to be more precise and clearer than the others. In order that men remain civilized or become such, it is essential that the art of associating be developed and perfected among them';[382] and that the 'most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and acting in common with them'.[383]

The broad and purposive approach advocated in *Big M Drug Mart Ltd.* is more likely to give rise to the inference that concerted activity on the part of a group of individuals for the purpose of furthering a lawful social or political cause is precisely the form of association that the drafters of the Charter contemplated, and that to impose a legalistic distinction between freedom of association and the freedom to pursue the objects of the association would be to deny the central purpose of that guaranteed freedom.

It is probable, therefore, that the restrictions on canvassing and solicitation of funds contained in sections 12 and 13 of the *Public Service Act* would be considered an infringement on the fundamental freedom of association.

(iii) Right to Candidacy for Membership in Parliament or a Legislature: Section 3

Section 12(1)(a) of the *Public Service Act* requires Crown employees, other than deputy ministers and Schedule 2 employees, to take a leave of absence in order to run as candidates for the provincial legislature or federal Parliament and, if elected, to resign from their positions, subject to a right of reinstatement. Deputy ministers and Schedule 2 employees who wish to become candidates must resign their position with no right of reinstatement.

Section 3 of the Charter provides as follows:

> 3. Every citizen of Canada has the right to vote in an election of members of

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[381] Cotler, "Freedom of Assembly, Association, Conscience and Religion", in *Commentary*, *supra*, note 367, 123, at 154.

[382] de Tocqueville, *Democracy in America* (14th ed., 1964), at 182.

[383] de Tocqueville (ed. Bradley), *Democracy in America* (1945), at 196.

> the House of Commons or of a legislative assembly and to be qualified for membership therein.

On a narrow reading of section 3, it could be argued that the above-mentioned requirements of section 12 of the *Public Service Act* do not affect the right to be qualified for candidacy but, rather, merely impose certain conditions on the employment relationship. However, it is certainly arguable that, by imposing requirements of a leave of absence without pay or resignation in order to become a candidate in an election, section 12 places practical limits on the right to be qualified and, in so doing, limits the democratic rights guaranteed by section 3 of the Charter.

(iv) Equality Rights: Section 15

It may also be argued that the *Public Service Act* limitations on political and critical comment and political activity and candidacy discriminate between Crown employees and other citizens, thereby breaching the equality protections of section 15(1) of the Charter. Section 15 of the Charter provides as follows:

> 15.-(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour religion, sex, age, or mental or physical disability.

The argument raises a threshold issue as to whether Crown employees would be considered a protected group for purposes of section 15(1) of the Charter.

Section 15(1) enumerates certain specific grounds that will clearly engage the equality protections; these are race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. However, it appears from the genesis of the language of section 15(1) that the drafters of the Charter did not intend that the enumerated grounds should constitute an exclusive or closed list. Rather, it seems that the phrase "without discrimination *and, in particular,* without discrimination based on", was intended by the drafters of the Charter to indicate that the enumerated grounds are merely illustrative, and that it remains open to the court to extend the protections to other identifiable groups.[384]

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[384] Emphasis added. See the discussion of the history of the development of the equality provision, and the debate before the Hays-Joyal Committee, in Bayefsky, "Defining Equality Rights", in Bayefsky and Eberts (eds.), *Equality Rights and the Canadian Charter of Rights and Freedoms* (1985) (hereinafter referred to as "Bayefsky") 1, at 47-51, and Ministry of the Attorney General, *Sources for the Interpretation of Equality Rights under the Charter: A Background Paper (Rev. ed., June, 1985)* (June, 1985) (hereinafter referred to as "Sources"), at 317-18.

If the grounds specified in section 15(1) are not regarded as an exhaustive list, a further question will arise concerning whether the equality protections would apply where a distinction has been made on *any* ground, or whether the courts would extend the protections only to groups that bear some similarity to the enumerated groups. Assuming that not every form of discrimination was intended to be encompassed by section 15, it has been suggested that the courts might look to various guidelines, which would be developed on the basis of a consideration of the characteristics underlying the enumerated groups, to determine whether the equality provisions should apply to a non-enumerated group. It has been suggested that the equality provision might be applied to groups exhibiting the following characteristics:[385]

(1) the group has received statutory protection from discrimination;

(2) the group has been subject to a pattern of discrimination;

(3) the major characteristics defining the group are immutable;

(4) the group is a discrete and cohesive class;

(5) the group is not economically based.

Non-enumerated grounds of discrimination that the courts might recognize could include political beliefs, marital status, family status, social condition[386] and sexual orientation.[387]

The courts might, however, avoid any attempt to delineate the reviewable grounds of discrimination in advance by regarding the equality provisions as entirely open-ended and dealing with all claims of discrimination on a case-by-case basis. This is the approach the American courts have taken in applying the equal protection provision of the Fourteenth Amendment, which is completely open-ended.[388] For instance, in the United States a claim of discrimination based on professional status will be heard by the courts.[389] This is not to say that any and every distinction is scrutinized with equal vigour by the American courts. The courts have indicated that legislation that affects some groups, particularly the historically disadvantaged, will be subject to "stricter scrutiny"; for example, legislation that discriminates on the grounds of race[390] will undergo a stricter scrutiny of legislative objective than legislation that distinguishes on the grounds of family status.[391]

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[385] Sources, *supra*, note 384, at 319-20.

[386] *Ibid.*, at 335-48.

[387] Bruner, "Sexual Orientation and Equality Rights", in Bayefsky, *supra*, note 384, 457, at 463-65.

[388] It appears also to be the general European approach: see Bayefsky, "Defining Equality Rights", *supra*, note 384, at 49.

[389] See *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 75 S.Ct. 461 (1955), where the Court considered the constitutionality of a legislative distinction between opticians and "sellers of ready-to-wear glasses".

It has been suggested that if the Canadian courts were to adopt a completely open-ended approach to the section 15 protections, it is probable that a varying standard of review would be applied, depending on the grounds for the discrimination.[392] Under this varying standard, stronger reasons, or more important government objectives, would have to be adduced in order to justify differential treatment of the enumerated groups than would be the case in respect of non-enumerated groups. Moreover, there would be greater scrutiny with respect to discrimination on grounds that closely resemble the enumerated grounds.

(e) Section 1 Justification

If the Court determines that a law infringes or limits a guaranteed freedom, it must then go on to determine whether the law in question is a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society, in light of the underlying government interest or policy objective.[393] Some of the principles that will guide the courts in such a determination have recently been enunciated by the Supreme Court of Canada in *R. v. Oakes*.[394]

The Court explained that section 1 has two functions. First, section 1 constitutionally guarantees the rights and freedoms set out in the provisions that follow; secondly, the section states explicitly "the exclusive justificatory criteria ... against which limitations on those rights and freedoms must be measured."[395]

The Court reiterated the principle that the rights and freedoms guaranteed by the Charter are not absolute, and that it may be necessary to limit those rights and freedoms in circumstances where their exercise would be "inimical to the realization of collective goals of fundamental importance".[396] However, the Court emphasized that a "stringent standard of justification"[397] will be imposed with respect to any limitation of the guaranteed rights and freedoms.

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[390] *Korematsu v. U.S.*, 323 U.S. 214, at 216, 65 S.Ct. 193 (1944).

[391] *Lalli v. Lalli*, 439 U.S. 259, at 275-76, 99 S.Ct. 518 (1978).

[392] Sources, *supra*, note 384, at 331.

[393] The Supreme Court has cautioned that not every interest or objective will be entitled to s. 1 consideration and that principles will have to be developed for recognizing which government objectives are of sufficient importance to warrant overriding a constitutionally protected right or freedom: *R. v. Big M Drug Mart Ltd.*, *supra*, note 356, at 352.

[394] (1986), 65 N.R. 87. The Court first determined that the presumption of innocence guaranteed by s. 11(d) of the Charter had been violated by a "reverse onus" clause contained in s. 8 of the *Narcotic Control Act*, R.S.C. 1970, c. N-1. It then considered whether s. 8 satisfied the requirements of s. 1 of the Charter.

[395] *Supra*, note 394, at 125.

[396] *Ibid.*, at 126.

The Court reaffirmed its earlier holding in *Hunter v. Southam*[398] that the onus of such justification rests upon the party seeking to uphold the limitation, and enunciated for the first time the standard of proof that will be required under section 1. The Court observed that, while it would be inappropriate to require that the criminal standard of proof be satisfied, the civil standard of proof by a preponderance of probability must be applied rigorously. The Court explained that, within the broad category of the civil standard, there exist different degrees of probability depending on the nature of the case; for instance, a higher degree is required in establishing allegations of fraud than of negligence.[399] The degree of probability required in a given case must be "commensurate with the occasion".[400] Because section 1 is invoked for the purpose of justifying a violation of the constitutional rights and freedoms the Charter was designed to protect, the Court held that a very high degree of probability will be required.[401]

The Court in *Oakes* also indicated the nature of the evidence that will be required to prove the constituent elements of a section 1 inquiry; such evidence must be "cogent and persuasive",[402] and should indicate to the court both the consequences of imposing or not imposing the limit, and the alternative measures for implementing the objective that were available to the legislators when they made their decisions.

The Court then articulated the two central criteria that must be satisfied in order to establish that a limit is reasonable and demonstrably justified in a free and democratic society. The first relates to the nature of the *objective* of the law itself; the second involves a consideration of the *means* chosen to achieve the objective.

To satisfy the first criterion, the *objective* must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. At a minimum, the objective must "relate to concerns which are pressing and substantial in a free and democratic society."[403]

The second criterion requires that the *means* chosen be reasonable and demonstrably justified. The Court explained that a determination of this second criterion involves "a form of proportionality test", the nature of which will vary depending on the circumstances.[404] This "proportionality test" has three components that are intended to balance the interests of society with those of individuals and groups. The Chief Justice stated:[405]

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[397] *Ibid.*

[398] *Supra*, note 356, at 155.

[399] *Supra*, note 394, at 126-28.

[400] *Ibid.*, at 128, quoting Lord Denning L.J. (as he then was) in *Bater v. Bater*, [1950] 2 All E.R. 458 (C.A.), at 459.

[401] *Supra*, note 394, at 128.

[402] *Ibid.*

[403] *Ibid.*, at 129.

> There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question: *R. v. Big M Drug Mart Ltd.* .... Third, there must be a proportionality between the *effects* of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of 'sufficient importance'.

The Court explained that this third component requires a recognition that a wide range of rights and freedoms are guaranteed by the Charter, and that an almost infinite number of factual situations may arise in respect of these rights and freedoms. The Chief Justice stated:[406]

> Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. *The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.*

Applying the *Oakes* criteria to the existing Ontario restrictions on political activity and public comment by Crown employees, it might be argued persuasively that the objective of the *Public Service Act*, that is, the maintenance of an impartial, effective public service, is of "sufficient importance" to override the constitutionally protected rights and freedoms contained in sections 2, 3 and 15(1) of the Charter. There might well be difficulty, however, in satisfying a court that the *means* of achieving this objective are reasonable and demonstrably justified, and satisfy the "proportionality test" propounded in *Oakes*. For example, restrictions imposed by section 14 of the Act, while rationally connected to the objective of the legislation, are arguably broader than necessary to achieve the objective, and impinge more than necessary upon freedom of expression. In addition, it is arguable that the restrictions imposed by sections 12 and 13 are overinclusive, in that they limit the political activity of a greater number of Crown employees than is necessary to achieve the objectives of efficiency and impartiality.

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[404] *Ibid.*

[405] *Ibid.* (emphasis in original).

[406] *Ibid.*, at 130 (emphasis added).

In this respect, the recent decision in *Fraser v. the Attorney General of Nova Scotia*[407] is of interest. In that case, the Nova Scotia Supreme Court, Trial Division, considered the validity of section 34(2) and (3) and section 35(c) of the *Civil Service Act*,[408] which provide as follows:

> 34.-(2) No deputy head or employee shall engage in partisan work in connection with any such election or contribute, receive or in any way deal with any money for any party funds.
>
> (3) Any person who violates this section is subject to dismissal from the Civil Service.
>
> 35. An employee, other than a deputy head or employee in a position or classification designated in the regulations, may be a candidate for election to any elective municipal office, including a school board, or actively work in support of a candidate for such office if
>
> . . . .
>
> (c) the candidacy, service or activity is not affiliated with or sponsored by a federal or provincial political party.

The applicant, Fraser, alleged that these provisions prevented him from doing the following:[409]

(1) Being a member of a provincial and/or federal political party;

(2) Associating with members of that party in their party activities;

(3) Attending meetings and assemblies of that party;

(4) Participating in developing policies and platforms of that party;

(5) Expressing publicly his views on political issues;

(6) Contributing financially to that party;

(7) Canvassing on behalf of that party;

(8) Campaigning for that party;

(9) Seeking nomination as a candidate for that party in a provincial or federal general election and if nominated, to run for office.

The Court found that the impugned provisions infringed sections 2, 3, and 15 of the Charter, and then applied *Oakes* in considering whether those provisions could be justified in light of section 1 of the Charter.

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[407] *Supra*, note 352.

[408] *Supra*, note 353.

[409] *Supra*, note 352, at 2.

The Court first determined that some limits on political activities by public employees were necessary in order to prevent an erosion of public confidence in the impartiality of the public service, and that, therefore, the *objective* of sections 34(2) and (3) and 35(c) related to concerns that were "pressing and substantial in a free and democratic society".

The Court then considered whether the *means* chosen met the proportionality test established in *Oakes*. Having been satisfied that the impugned provisions were "rationally connected" to the objective, Grant J. went on to consider whether the means used impaired "as little as possible" the guaranteed rights and freedoms that were infringed. In making this determination, the Court engaged in a comparative examination of limitations on political activity by public employees in other jurisdictions, including those imposed by other Canadian provinces, the Canadian federal government, Britain, and the United States.

The Court concluded that the means used, that is, the restrictions imposed by section 34(2) and (3) and section 35(c), were excessive in their impairment of the rights and freedoms guaranteed by sections 2, 3, and 15 of the Charter, and that the objective could have been achieved by less severe measures. Accordingly, section 34(2) and (3) and section 35(c) of the *Civil Service Act* were held to be of no force and effect.

One aspect of section 1 that was not discussed by the Supreme Court of Canada in *Oakes* is the requirement that a limit on a guaranteed right or freedom be "prescribed by law". It has been suggested that this phrase may prove to be of particular importance where infringements of Charter rights are alleged to have been imposed by non-statutory government action, such as through the application of policy directives or by the actions of administrative bodies.[410] The intention behind this requirement may have been to enhance the accountability of law makers with respect to Charter infringements by requiring that such laws be visible to and ascertainable by the public.

The meaning of "prescribed by law" has been canvassed by the Ontario Divisional Court in *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors*,[411] and affirmed by the Ontario Court of Appeal.[412] The Divisional Court explained that statutory law, regulations, and even common law limitations, may be permissible. However, to be acceptable, the limit "must have legal force", in order "to ensure that it has been established democratically through the legislative process or judicially through the operation of precedent over the years."[413] The Court then considered the nature of the authority with which the Ontario Board of Censors was charged pursuant to sections 3, 35, and 38 of the *Theatres Act*,[414] and held that, although there had been a legislative grant of power to the Board, the limits on expression of film-makers had not been legislatively authorized. The Court stated:[415]

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[410] See Sources, *supra*, note 384, at 166.

[411] (1983), 41 O.R. (2d) 583, 147 D.L.R. (3d) 58 (Div. Ct.) (subsequent references are to 41 O.R. (2d)).

[412] (1984), 45 O.R. (2d) 80, 5 D.L.R. (4th) 766 (C.A.).

[413] *Supra*, note 411, at 592.

> The Charter requires reasonable limits that are prescribed by law; it is not enough to authorize a board to censor or prohibit the exhibition of any film of which it disapproves. That kind of authority is not legal for it depends on the discretion of an administrative tribunal. However dedicated, competent and well-meaning the board may be, that kind of regulation cannot be considered as 'law'. *It is accepted that law cannot be vague, undefined, and totally discretionary; it must be ascertainable and understandable.* Any limits placed on the freedom of expression cannot be left to the whim of an official; *such limits must be articulated with some precision or they cannot be considered to be law.*

Accordingly, the Divisional Court held the impugned sections to be of no force and effect.

There may be some question regarding the degree of precision that will be required of a law in order to satisfy the criterion "prescribed by law", particularly with respect to the scope of discretionary rule-making conferred by the law. It has been suggested that the courts might require that a law need only set out general standards by which the discretion should be exercised. A more stringent interpretation would require that a limit on Charter rights would have to be spelled out in the enabling legislation in extensive detail.[416]

In fashioning proposals for reform, therefore, it will be necessary to attempt to provide for precision and certainty in order that the criterion of "prescribed by law" may be satisfied.

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[414] R.S.O. 1980, c. 498. Sections 3, 35, and 38 were repealed by S.O. 1984, c. 56, ss. 3, 13, and 15, respectively, and new sections were substituted. The 1984 Act is to come into force on proclamation.

[415] *Supra*, note 411, at 592 (emphasis added).

[416] See Sources, *supra*, note 384, at 176-84. The European Court of Human Rights has cautioned, in considering the phrase "prescribed by law", that absolute precision may be neither possible nor desirable:

> Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able — if need be with appropriate advice — to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. These consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, while certainty is highly disirable [*sic*], it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.

Sunday Times v. United Kingdom, 2 EHRR 245, quoted in Sources, *supra*, note 384, at 167-68.

CHAPTER 4

COMPARATIVE PERSPECTIVES ON POLITICAL ACTIVITY AND CONFIDENTIALITY

1. INTRODUCTION

Rules on the political activity of public servants vary not only from one country to another, but also from one jurisdiction to another within a single country. There is, for example, considerable variation in the rules among provincial governments in Canada. A useful means of depicting the nature of the rules in various governments is to place each government on a continuum running from the pole of unrestrained political activity to that of completely prohibited political activity. Governments can fairly easily be located on this continuum according to their *formal* written rules, appearing in statutes, regulations, and guidelines; however, the extent to which public servants are *actually* permitted to engage in political activity may vary significantly from what appears to be permissible on the basis of a reading of the formal rules. The risk of generalizing on the basis of superficial analysis of the formal rules can be demonstrated by reference to the Armitage Committee's assertion that "public servants in Canada ... seem to have rather more latitude [in the exercise of political activity] than in Britain ...."[1] Canadian commentators believe that the opposite is true with respect to both the federal government and most provincial governments.

Data on the extent of involvement of public servants in partisan politics are essential to an accurate picture of a country's political activity regime, but for many countries such data are unavailable or incomplete. In the absence of sufficient data for a particular country, conclusions about the desirability of transplanting that country's formal rules to another country must be drawn cautiously. Moreover, studies in comparative public administration have shown that it is risky to conclude that policies and practices that seem to work well in one country will necessarily work well in another. Account must be taken of the unique historical, political, and social circumstances in which administrative arrangements have evolved in each country and of the possibility that these arrangements will be inappropriate in countries with a different political and administrative culture. The Armitage Committee observed that "[m]erely to describe the existing rules [on political activity by public servants] would be insufficient indication of how each Civil Service currently operates."[2] Moreover, "[p]ractice clearly largely depends upon, and must be seen in the light of, the political history of the country concerned, the constitutional relationships which have grown up between [the] legislature and the executive, and what is normally expected of civil servants by politicians and by the public at large."[3]

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[1] United Kingdom, *Committee on Political Activities of Civil Servants* (Cmnd. 7057, 1978) (hereinafter referred to as "Armitage Report"), para. 31, at 10.

Nevertheless, a comparative analysis of the political activity rules in various jurisdictions serves very useful purposes. It provides models and insights regarding arrangements that could be effectively *adapted* for use elsewhere and it gives a rough indication of where specific jurisdictions fall on the political activity continuum. It also provides some basis for judgment as to whether the limits on political activity in the Province of Ontario can, under the *Canadian Charter of Rights and Freedoms*,[4] be demonstrably justified to be reasonable limits in a free and democratic society.

For this study, it is sensible to focus comparative analysis on jurisdictions with a political system or political culture similar to that of Ontario, namely Canada, Britain, the United States, Australia, and New Zealand. We first deal with the political activity regime of each of these countries. Thereafter, we shall describe briefly the rules governing confidentiality and the disclosure of government information in each jurisdiction.

2. CANADA

(a) POLITICAL ACTIVITY

(i) Federal

a. Public Service Employment Act

The federal *Public Service Employment Act*[5] addresses only the issue of political partisanship. Section 32(1) of the Act provides that deputy heads and, except as otherwise authorized under the section, employees are subject to two prohibitions. First, they must not engage in work for, on behalf of, or against a candidate for election to the House of Commons, a provincial legislature or the Council of the Yukon Territory or the Northwest Territories, or in work for, on behalf of, or against a political party. Secondly, they cannot be candidates for election to any of these bodies.

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[2] *Ibid.*, para. 30, at 10.

[3] *Ibid.*, para. 32, at 10.

[4] Being Part I of the *Constitution Act, 1982*, which is Schedule B of the *Canada Act 1982*, c. 11 (U.K.), as am. by the Constitution Amendment Proclamation, 1983, SI/84-102, effective June 21, 1984.

[5] *Public Service Employment Act*, R.S.C. 1970, c. P-32. See, also, *Canada Elections Act*, R.S.C. 1970, c. 14 (1st Supp.), s. 21(1)(f), which provides that "every person who accepts or holds any office, commission or employment, permanent or temporary, in the service of the Government of Canada at the nomination of the Crown or at the nomination of any of the officers of the Government of Canada, to which any salary, fee, wages, allowance, emolument or profit of any kind is attached, during the time he is so holding any such office, commission or employment" is not eligible as a candidate at an election.

Also relevant is the oath or affirmation of office and secrecy, required by s. 23 of the *Public Service Employment Act*, by which an employee promises to fulfil his or her duties faithfully and honestly: see Canada, Treasury Board, *Personnel Management Manual* (1984), Vol. I, ch. 4, at 9.

The Act defines "deputy head" and "employee". The former term refers to a deputy minister in the case of a department, and a person designated as the deputy head in the case of a division or branch of the public service designated as a department. In the case of "any other portion of the Public Service to which the [Public Service] Commission has the exclusive right and authority to appoint persons", "deputy head" means "the chief executive officer thereof or, if there is no chief executive officer, such person as the Governor in Council may designate as the deputy head for the purposes of this Act".[6] The Act provides that " 'employee' means a person employed in that part of the Public Service to which the Commission has the exclusive right and authority to appoint persons".[7]

Section 32(2) states that the general prohibition on partisan political activity in subsection (1) does not extend to attendance at a political meeting or the contribution of money for the funds of a party or to a candidate. Section 32(3) provides that, notwithstanding any other Act, an employee may apply to the Public Service Commission for a leave of absence without pay to seek nomination as a candidate and to be a candidate for election to the House of Commons, a provincial legislature, or a territorial council. Unlike the Ontario *Public Service Act*,[8] there is no entitlement to leave; section 32(3) provides that the Public Service Commission may grant a leave of absence "if it is of the opinion that the usefulness to the Public Service of the employee in the position he then occupies would not be impaired by reason of his having been a candidate for election".[9] Upon receipt of an application, the Public Service Commission sends a copy of it to the appropriate deputy head and seeks his or her advice as to whether the usefulness of the employee would be impaired.[10]

An application for a leave of absence must be made sufficiently in advance of the proposed date of leave and of the nominating convention to allow the Public Service Commission to process it. If an earlier date is not specified, the leave must begin on the day on which the employee actively seeks the nomination.[11] Section 32(3) provides that, where leave is granted, it is for a period ending on the day on which the election results are declared officially, or on an earlier day, as requested by the employee, if the employee has ceased to be a candidate. Where leave is granted, the Commission must arrange for a notice to be published in the *Canada Gazette*.[12] Upon election, the person ceases to be an employee. No provision is made for reinstatement following service as an elected member.

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[6] *Public Service Employment Act*, *supra*, note 5, s. 2(1).

[7] *Ibid*.

[8] R.S.O. 1980, c. 418.

[9] For a case where an employee sought and obtained nomination as a candidate after his application for leave had been refused, see *Re Brewer and Treasury Board (Revenue Canada)*, unreported (April 11, 1979, P.S.S.R.B., Kates).

[10] See Canada, Public Service Commission, Bulletin No. 67-16, "Administration of Section 32 of the Public Service Employment Act, — Political Partisanship" (August 9, 1967), at 1.

In the period from 1975-1985, the Public Service Commission received 145 requests for leave, of which 120 were granted.[13] In determining whether "the usefulness of ... the employee ... would not be impaired by reason of his having been a candidate", the Public Service Commission considers several factors, including the position of the employee and his or her specific responsibilities:[14]

> Before making a decision to grant or deny a request for leave, the Commission attempts to determine whether, if leave is granted, the employee would be exposing him/herself to criticism in the area of political partisanship. Consequently, the Commission distinguishes between groups and levels of positions. For example, executives have not been granted leaves of absence for political candidacy because of the requirement that the political neutrality of senior management must be beyond question. As well, the Public Service Commission has generally taken the position that it could not grant political leave in cases where the individual public servants concerned are responsible for enforcing regulations or statutes.
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> The Commission also takes into account not only the particular position of the applicant but also the community in which that position is located, and its sensitivity to the political activity of a particular public servant.

Before denial of leave, the employee is afforded an opportunity to present his or her case personally to the Public Service Commission.[15]

The meaning of the prohibition set out in section 32(1) of the *Public Service Employment Act* is not entirely clear. The provision states simply that deputy heads and employees must not "work for, on behalf of or against a candidate" in a federal, provincial, or territorial election, or "for, on behalf of or against a political party". The meaning of this phrase was considered in *Re Brewer and Treasury Board (Revenue Canada)*,[16] in which the Public Service

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[11] See *Personnel Management Manual*, *supra*, note 5, Vol. I, ch. 4, at 2 and 6.

[12] *Public Service Employment Act*, *supra*, note 5, s. 32(4).

[13] Statistics were kindly provided by the Public Service Commission of Canada, based on a survey of their Annual Reports (1975-1985). From January 1, 1986, to March 31, 1986, one request for leave was received, and it was granted.

[14] *Personnel Management Manual*, *supra*, note 5, Vol. I, ch. 4, at 4-5.

[15] *Ibid.*, at 5.

[16] (1980), 27 L.A.C. (2d) 201 (P.S.S.R.B., Frankel).

Staff Relations Board stated that "to be engaged 'in work for, on behalf of or against a candidate ... [or] a political party' is to expend conscious and purposive effort to bring about the election or defeat of a candidate, the success or failure of a political party."[17]

Apparently, the breadth of the language of section 32(1) has led to uncertainty concerning the permissible bounds of political activity for, in 1984, the Public Service Commission issued a statement of its "interpretation of the spirit and the scope of the law".[18] This communication addressed the issue of partisan political activity in considerably more detail than the Act, and even addressed the issue of public comment.

The views of the Public Service Commission followed from its premise that the importance of impartiality required the declaration of "principles of conduct" that went beyond the electoral context. It adopted the following general principle:

> Federal Public Service employees should not undertake activities, assume responsibilities or make public statements of a politically partisan nature or of a kind which could give rise to the perception that they may not be able to perform their duties as public servants in a politically impartial manner.

In elaborating the meaning of this principle, the Commission proposed the following prohibitions as "guidance":

> For greater clarity of this general principle, we propose the following guidance:
>
> - employees should not personally campaign for or against political parties or candidates in federal, provincial or territorial elections;
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> - employees should not become involved in the solicitation, collection, distribution or administration of the finances of political parties or of candidates in federal, provincial or territorial elections;
>
> - employees should not assume any official functions or be elected to any

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[17] *Ibid.*, at 207. The Board elaborated as follows (*ibid.*):

> Some actions or efforts obviously fall into this category — participating in the planning and organization of political campaigns; soliciting funds for candidates or parties; canvassing the support of voters; speaking at public meetings on behalf of candidates or a party. Other actions or efforts may be more difficult to assess in terms of the ends towards which they are directed. Paragraph 32(1)(a) of the Act, by the very generality of its language, is open to abuse in ways that might be even more restrictive of the political rights of public servants than was intended by Parliament. It therefore needs to be construed rigorously.

The Board (at 215) characterized s. 32(1) as "a restrictive statutory provision which is not distinguished for its clarity and precision".

[18] Canada, Public Service Commission, "Message from the Commissioners of the Public Service of Canada to federal employees", published in "DialoguExpress" (February, 1984).

recognized offices, including being a delegate to meetings or leadership conventions, on behalf of a candidate or a political party at the federal, provincial or territorial level;

- employees must not stand for elected office or seek nomination in a federal, provincial or territorial election, unless they have first obtained permission from the Public Service Commission to take leave without pay in order to do so.

The Commission emphasized that this statement of prohibitions did not detract from the rights that were currently enjoyed by public servants, of which the following were listed:

- to vote;
- to make financial contributions to political parties;
- to stand for nomination and run in a federal, provincial or territorial election, subject to prior approval by the Public Service Commission;
- to attend meetings of a political party.

However, the Commission cautioned that, even in exercising these rights, public servants should "ensure that their behaviour will not compromise the credibility of the Public Service as an impartial institution". Public servants employed in management positions, in positions providing direct service to the public, and who interpret and apply legislation or regulations were enjoined to be particularly circumspect.

Section 32(6) of the Act provides for a procedure where a contravention of the general prohibition on partisan political activity is alleged. Where such an allegation has been made by a person who is or has been a candidate for election, it is referred to a board established by the Public Service Commission to conduct an inquiry, at which the person making the allegation and the deputy head or employee whose actions are in issue, or their representatives, are entitled to be heard. The board is required to notify the Commission of its decision. In the case of a deputy head, the Commission must report the decision to the Governor in Council who, if the board has concluded that a deputy head has contravened section 32(1), may dismiss the deputy head. Where the board has decided that an employee has contravened section 32(1), the Public Service Commission may dismiss the employee.

As we have indicated, the *Public Service Employment Act* is concerned only with partisan political activity; it fails to address the propriety of political activity at the municipal level or other forms of what we have called nonpartisan political activity. Except where municipal politics involves political parties, a deputy head and an employee would appear to be free to participate at the municipal level, even to the point of becoming a candidate and serving in office, subject to the common law respecting the duty of loyalty.[19] Subject to this duty, other nonpartisan political activity would also appear to be permitted.

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[19] See Canada, Public Service Commission, Bulletin No. 70-23, "Political Partisanship in

b. Recommendations for Change

Within the past decade, issues relating to the political activity of federal government employees have been considered by various bodies in the context of their studies of broader topics. In 1979, the Special Committee on the review of Personnel Management and the Merit Principle in the Public Service submitted its final Report, which sought to examine all matters pertaining to the *Public Service Employment Act*.[20] One chapter of the Report was devoted to political participation by members of the federal public service. Five years later, in the *Report of the Task Force on Conflict of Interest: Ethical Conduct in the Public Sector*, political activity and public comment were examined as part of a study of the conduct of public office holders.[21] Most recently, in *Equality for All*,[22] the Parliamentary Committee on Equality Rights briefly considered whether the limitations on political rights imposed by section 32 of the *Public Service Employment Act* were justifiable.

In the following section, we shall canvass the discussion in these Reports and review their proposals for change.

(1) Report of the Special Committee on the Review of Personnel Management and the Merit Principle (D'Avignon Report)

The Special Committee considered whether federal public servants should be allowed to participate in political activity at the provincial or federal level. It accepted, without discussion, that all public servants should continue to enjoy freedom to engage in political activity at the municipal level.[23]

The discussion of political participation began with the assertion that, since political participation is a right enjoyed by citizens, that right should be extended to public servants and limited only "in the exceptional cases where any indication of partisan political interests would compromise the reputation of

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Connection with Municipal Elections" (July 14, 1970). In this Bulletin, the PSC stated that it had received an opinion from the Department of Justice stating that a public servant might contravene s. 32 where a political party has entered a municipal election and the public servant during the election in fact engages in work for or on behalf of or against a political party. Thus, a public servant running for municipal office might violate s. 32, even where he or she is not a candidate of a party, if the opponent is sponsored by a party.

[20] Canada, *Report of the Special Committee on the review of Personnel Management and the Merit Principle* (1979) (hereinafter referred to as "D'Avignon Report").

[21] Canada, *Report of the Task Force on Conflict of Interest: Ethical Conduct in the Public Sector* (1984) (hereinafter referred to as "Ethical Conduct Report").

[22] Canada, *Report of the Parliamentary Committee on Equality Rights: Equality for All* (1985) (hereinafter referred to as "Equality Report").

[23] Following discussion of its recommendations, the Special Committee stated simply that "[n]one of the above proposals would change the present freedom of all public servants to participate in political activity at the municipal level": D'Avignon Report, *supra*, note 20, at 175.

the public service for impartiality or would damage the individual's effectiveness as a public servant''.[24]

Having stated this fundamental principle, the Special Committee identified two situations where it is essential to require public servants to be nonpartisan: first, in the case of public servants ''who either advise on the formulation of policy or direct its implementation'';[25] and secondly, where nonpartisan behaviour is necessary to ensure the continued effectiveness of public servants in the performance of their duties.[26]

As a model of a structure that would separate the cases in which nonpartisan behaviour was required from those in which it was not, the Special Committee adopted the British tripartite system, a system that will be discussed in some detail in a subsequent section of this chapter.[27] Accordingly, it recommended that the public service be divided into three Parts as follows:[28]

> Part I — those occupational groups in which the duties of all positions are sufficiently sensitive to require the denial of the right to participate actively in the political process to all incumbents;
>
> Part II — those occupational groups in which the duties of the positions vary, so that neither a blanket denial nor complete political freedom can be supported;
>
> Part III — those occupational groups in which the duties of all positions are such that incumbents can be permitted full political freedom.

Employees within the occupational groups placed in Part I would be prohibited from active participation in political activities at both the federal and provincial level. Those within the occupational groups placed in Part II would have freedom of political involvement, provided that they had applied for, and received, the approval of the Public Service Commission. Before deciding the application, the Public Service Commission would have to consult with the department employing the public servant. Persons within the occupational groups placed in Part III would have full freedom of political action.

The Special Committee also considered which types of employee should be placed in the various divisions set out above. With respect to Part I, it was of the view that persons occupying senior management positions should be included because the exercise of their duties has ''a direct effect on the public, either through the advice they give on matters of government policy or by their actions in implementing such policies''.[29] It therefore recommended that certain senior occupational groups be placed in Part I.

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[24] *Ibid.*, at 171.

[25] *Ibid.*

[26] The latter standard is a very general criterion, and is similar to the concluding phrase of the statement of the guiding principle. The Special Committee cited as an example public servants whose duties involved awarding contracts, grants, or jobs, on the ground that political participation would entail a risk that the discharge of their responsibilities would be perceived as having been affected by political motivations: see *ibid.*, at 172-73.

[27] See *infra*, this ch., sec. 3(a).

[28] D'Avignon Report, *supra*, note 20, at 172.

With respect to Part II, the Special Committee observed that certain occupational groups included both persons whose duties were such as to render political activity inappropriate and persons for whom political activity would be acceptable. As examples of the former, the Committee cited persons in the Commerce Group whose duties entailed deciding whether to award grants, and employees in the Purchasing and Supply Group responsible for awarding contracts. The Special Committee then identified seven occupational groups that should be placed in Part II.[30]

The Special Committee emphasized that whether individual public servants whose occupational groups were placed in Part II were to be restricted would depend on the nature of their particular duties and responsibilities, regardless of whether other employees within the same group were denied freedom to engage in political activity.

Occupational groups that were not placed in either Part I or Part II would be placed in Part III, and would enjoy full freedom of political action.

Employees who were denied the right to participate actively would be permitted only to attend political meetings, make financial contributions, and vote.

Employees who were free to participate in politics, whether because they were within the occupational groups placed in Part III, or because, although in Part II, they had received the approval of the Public Service Commission, would enjoy complete freedom, including the right to seek nomination as a candidate and to run for political office.[31] In so recommending, the Special Committee stated that it was very difficult to differentiate among types of political activity, based on its view that, whatever the activity, a person would be associated by the public with the party for whom he or she worked.[32]

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[29] *Ibid.*

[30] It recommended (*ibid.*, at 173) that the following occupational groups be placed in Part II: Commerce; Program Manager; Purchasing and Supply; Law; Economic, Sociology, and Statistics; Information Services; and Personnel Management.

[31] *Ibid.*, at 174.

[32] Its ''all or nothing'' approach was justified in the D'Avignon Report as follows (*ibid.*):

> Freedom to participate should either be given without restriction or withheld. It would be very difficult to allow freedom for certain forms of political participation and not all. The public servant who participates in politics will be seen by the public in the same light, regardless of the extent of that participation. The public servant who works for a political party, whether by erecting a sign on his front lawn, working in a campaign office or actively campaigning has declared himself politically and will be associated with that political party.

While it was stated that no restriction would apply to free employees, the issue of candidacy and serving in office would appear to be complicated by the position taken with respect to leaves of absence. The Special Committee stated simply that a "[l]eave of absence is a condition of employment and therefore properly a matter for management's discretion, dependent upon conditions for leave of absence negotiated in collective agreements".[33]

The Special Committee was of the view that public servants should be made aware of their rights, whether or not they had been allowed freedom to participate, and that the burden of interpreting the relevant legislation or guidelines should not be cast upon them. It therefore recommended that, in the event of a change in the rules governing political activity, "all public servants be advised immediately thereafter of the specific rights accorded them and that advertisements for vacancies and job descriptions make clear the precise degree of political participation permitted the incumbent of a position".[34]

Although its recommendations would improve dramatically the position of federal public servants with respect to the exercise of political rights, in its concluding remarks the Special Committee evinced some doubt about the possibility of achieving a complete reconciliation of all the competing interests:[35]

> The restoration of political rights to public servants is not without risk. Some members of the public may well view it as confirmation of their suspicions that public servants are politically motivated in the exercise of their official duties. However, this perception is already held by many people and will continue to be, no matter what efforts are made to find a solution through legislation. There will continue to be politically active public servants, regardless of any law to the contrary.
>
> We think it far more important to put legislation in step with reality by according to a great number of public servants the rights of political participation enjoyed by most Canadians than to perpetuate the present unenforceable system.
>
> ....
>
> The Special Committee is not convinced that politically active public servants can, in absolute terms, leave their politics behind when they enter the work place. It is equally convinced first, that the country's interests are best served by a concerned and involved citizenry and second, that the limitations proposed in this report would provide at least adequate assurance of political neutrality in the bureaucracy's advisory and decision-making processes.

(2) Report of the Task Force on Conflict of Interest

In June, 1983, the Task Force on Conflict of Interest was established, at the request of the then Prime Minister, the Right Honourable Pierre E.

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[33] *Ibid.*

[34] *Ibid.*

[35] *Ibid.*, at 175.

Trudeau, "to undertake a general review of policies and practices which do and should guide the conduct of present and former public office holders in the federal government, and to make recommendations in this area."[36] In his letter to the co-chairmen of the Task Force, the Prime Minister asked the Task Force to "focus in particular on the need to ensure both public confidence in and the integrity of the governmental process and the need to attract to government individuals of high calibre from all walks of life."[37]

The Prime Minister's letter had requested a study that would deal with Ministers, Parliamentary Secretaries, exempt staff, and full-time Governor-in-Council appointees, both during and after their period of service, and suggested that this study would be useful in considering the policies applicable to public servants. However, the Terms of Reference appended to the letter requested that the Task Force examine and report on the policies and practices that should govern the conduct of public servants as well.[38] The Task Force interpreted its mandate to comprehend public servants, and therefore recommended a system that would apply to officials at all levels, including public servants and the positions named in the Prime Minister's letter.[39]

Among the many matters examined in this lengthy Report are partisan political activity and public criticism of government policy. The Task Force regarded partisan political activity and public criticism of government policy as "improper forms of conduct for those in the public service",[40] as distinct from other activities, such as self-dealing by a public office holder or private use of government property, which it classified as unethical conduct. It observed that partisan political activity and public criticism could lead to a conflict of interest if the discharge of duties by a public servant were inappropriately affected by personal or private views.

The Task Force regarded political activity that had the effect of impugning the professionalism of a public servant as a type of conflict of interest. This conflict, it explained, was "in the nature of a breach of trust",[41] in contradistinction to a financial conflict, insofar as it would call into question "the doctrine of a politically neutral and impartial public service".[42]

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[36] Ethical Conduct Report, *supra*, note 21, at 2.

[37] *Ibid.*, at 4.

[38] *Ibid.*, at 5.

[39] *Ibid.*, at 6. In the Ethical Conduct Report, the term "public office holder" was employed. It was generally used to mean "anyone engaged in the federal public sector, or remunerated by the Crown in Right of Canada": *ibid.*, at 14. A "non-elected office holder" referred to all public office holders, "except ministers, parliamentary secretaries, and ministers' exempt staff": see *ibid.* More detailed definitions were used in the draft *Ethics in Government Act*, which appeared as Schedule E to the Report.

[40] *Ibid.*, at 34.

[41] *Ibid.*, at 43.

[42] *Ibid.*

The Task Force reviewed the arguments for and against restrictions. In favour of political restrictions, the following arguments were cited:[43]

> It can, on the one hand, be argued that there is a need to protect and maintain the political impartiality of the public service, since employees engaging in political activities would at least undermine public confidence in its impartiality by placing themselves in circumstances that would develop loyalties to a political party at the expense of their loyalty to their minister and the government. Also, the employee could face conflict of interest situations where the objectives of the government and those of his or her political party are in conflict. Strong party affiliations could also place employees in situations where they may feel a desire to influence decisions improperly on the basis of political patronage, such as in employment matters or the awarding of contracts. Finally, there is the view that, where restrictions on partisan activity by public servants do exist, they result in a climate which is more likely to engender an attitude of professional neutrality and impartiality.

The Task Force then identified certain considerations that, in its view, favoured a politically neutral public service, and adopted the following expression of the principle of political neutrality:[44]

> Non-elected public office holders must not engage in partisan political activities which will jeopardize the political neutrality, both real and perceived, of the public service.

Turning to the existing legislation, the Task Force observed that the provisions of section 32 of the *Public Service Employment Act* "strike an acceptable balance between individual freedom and the requirement for a politically neutral public service".[45] It took a decidedly benign view of section 32, which, it observed, had the "practical effect ... [of extending] virtually full political rights to roughly 90 per cent of public servants."[46] Given the prohibition against working for, or on behalf of or against a candidate or a political party and the interpretation of this prohibition by the Public Service Commission of Canada,[47] the accuracy of this characterization may be questioned.

In accordance with these views, the Task Force recommended that section 32 be retained. However, it proposed that it be moved from the *Public Service Employment Act* to the proposed *Ethics in Government Act*,[48] the statute that it had proposed as general legislation to govern conduct by public officials. It further recommended that the responsibility for the administration of section 32 be transferred from the Public Service Commission to the proposed Office of Public Sector Ethics.[49] The tentative draft *Ethics in Government Act*, which appeared as Schedule E to the Report, included provisions giving effect to these recommendations. The draft Act also contained a Code of Ethical Conduct, which declared ten ethical principles, one of which was the principle of political neutrality that had been stated by the Task Force. Finally, the draft Act provided that a violation of this principle would render a non-elected office holder liable to dismissal.

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[43] *Ibid.*, at 45.

[44] *Ibid.*, at 46.

[45] *Ibid.*, at 236.

[46] *Ibid.*

[47] See discussion *supra*, this ch., sec. 2(a)(i)a.

[48] The Task Force acknowledged that the language of s. 32 creates some uncertainties, and suggested that the branches of the federal government that had been involved with its operation might propose amendments prior to the incorporation of an equivalent section in the proposed *Ethics in Government Act*: see Ethical Conduct Report, *supra*, note 21, at 237-38.

The approach of the Task Force to the question of public criticism of government policy paralleled its treatment of partisan political activity. It accepted that there is a "well-established tradition that Government employees do not express publicly their personal opinions on matters of political controversy or on existing or proposed Government policy or administration."[50] However, it was observed that, as a consequence of various factors, certain public officials had been given latitude to comment publicly. For example, where government had adopted the policy of meeting with interest groups or community representatives, public comment on the part of the official involved was regarded as inevitable.[51]

The Task Force was of the view that public office holders should be given guidance concerning the kinds of public comment that are permissible, the proper procedure to be followed in dealing with the public and the press, and the means by which any uncertainty respecting public comment is to be resolved. To this end, it favoured the inclusion of a rule on public comment in a code of ethics.

The Task Force was of the view that there had been no change in the traditional rule that public criticism of governmental policy or administration is forbidden except by a public servant who has been granted leave to become a candidate. Whatever its accuracy at the date of the Report, this statement has been superseded by the decision of the Supreme Court of Canada in *Re Fraser and Public Service Staff Relations Board*,[52] which held that a degree of public criticism is permissible.[53] Moreover, it is doubtful whether so broad a limitation on public comment would withstand a challenge under the *Canadian Charter of Rights and Freedoms*,[54] particularly in light of the *Fraser* decision. The Task Force certainly was cognizant of the impact of the Charter, despite its reference to "the traditional rule". It noted that any restriction on public comment would have to be clearly and concisely stated, and would have to satisfy the standard set out in section 1.

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[49] *Ibid.*, at 236-37.

[50] *Ibid.*, at 46, quoting Kernaghan, *Ethical Conduct: Guidelines for Government Employees* (1975), at 35.

[51] See Ethical Conduct Report, *supra*, note 21, at 47.

[52] (1985), 23 D.L.R. (4th) 122 (S.C.C.), aff'ing [1983] 1 F.C. 372 (1982), 142 D.L.R. (3d) 708 (C.A.), aff'ing (1983), 5 L.A.C. (3d) 193 (P.S.S.R.B., Kates).

[53] See discussion *supra*, ch. 3, sec. 2(b)(ii).

[54] *Supra*, note 4.

The Task Force included the following principle in the Code of Ethical Conduct contained in its draft *Ethics in Government Act*:[55]

> Non-elected public office holders shall not express publicly their personal views on matters of political controversy, or on government policy or administration (apart from collective bargaining issues),[56] where this is likely to impair public confidence in the existing or subsequent performance of their duties or which is likely to impair relations with other governments.

Finally, the Task Force recommended that the administrative responsibility for dealing with matters of public comment should be given to the proposed Office of Public Sector Ethics, and that a violation of the principle respecting public comment should expose a person to discipline.[57]

(3) *Report of the Parliamentary Committee on Equality Rights*

On February 26, 1985, pursuant to an Order of Reference, the Standing Committee on Justice and Legal Affairs of the House of Commons was empowered to undertake an inquiry into the equality rights established under the *Canadian Charter of Rights and Freedoms*. The Order referred to the Committee the "Discussion Paper on Equality Issues in Federal Law",[58] which had been tabled in the House of Commons at the end of January. In the Order of Reference, the Committee was instructed to review federal statutes, with particular emphasis on those mentioned in the Discussion Paper, "in order to ensure their conformity with the letter and spirit of equality and non-discrimination guarantees in the Charter."[59] The Committee established a subcommittee to study the status of equality rights, which was ordered subsequently to report its findings directly to the House of Commons. That subcommittee styled itself the Parliamentary Committee on Equality Rights.

In its Report, the Parliamentary Committee on Equality Rights examined federal statutes, regulations, policies and programmes in light of section 15 of the Charter, which provides as follows:

> 15.-(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in

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[55] See Ethical Conduct Report, *supra*, note 21, Schedule E, at 4.

[56] The Task Force stated (*ibid.*, at 47) that, in formulating its basic principle on public comment, "it is not intended to limit the rights of any employee in relation to any matters lawfully within the subject of collective bargaining under the Public Service Staff Relations Act."

[57] *Ibid.*, at 238-39.

[58] Sessional Paper No. 331-4/6 (January 31, 1985).

[59] Equality Report, *supra*, note 22, at v.

> particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

The discussion in the Report is organized according to various themes, which reflects particular areas of concern involving equality issues.

The issue of political rights for public servants was considered briefly in a chapter in which certain miscellaneous equality issues, which did not "fit neatly" into the other chapters, were addressed. The discussion offers little guidance. After reciting the political rights enjoyed by all Canadian citizens and reviewing section 32 of the *Public Service Employment Act*, the Committee stated as follows:[60]

> While we believe that the political neutrality of the public service must be preserved as a general principle, it seems to us that the rights of public servants are, at least in certain circumstances, unduly curtailed. The prohibition against campaigning, soliciting funds and assuming official functions with a political party applies to all public servants, even to those whose job classifications are such that no suspicion of conflict of interest or breach of trust might arise from the exercise of such political rights.

Its recommendation — "that section 32 ... be amended to ensure that no greater limitations are imposed on the political rights of public servants than are necessary to maintain a politically neutral public service"[61] — raises the fundamental issue that we have been asked to resolve in this Reference.

(ii) The Provinces and Territories

a. British Columbia

In British Columbia, the right to engage in political activity is regulated separately for four groups of government employees. The majority of employees are governed by a Master Agreement between the Government of the Province and the British Columbia Government Employees Union ("BCGEU").[62] Professional employees are members of another bargaining unit and their political activity is addressed in the Master and Subsidiary Agreements with the Professional Employees Association.[63] Nurses employed by the provincial government, the third bargaining unit, are subject to the Fifth Nurses Master and Component Agreements between the Government and the Registered Psychiatric Nurses Association of British Columbia and the British Columbia Nurses' Union.[64] These agreements deal with political activity among other matters. Managerial and certain other employees who are excluded from the definition of "employee" in the *Public Service Labour Relations Act*[65] and who are not members of the bargaining unit are subject to a Treasury Board Order, issued by the Treasury Board, defining the Terms and Conditions of Employment for Excluded Employees.[66]

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[60] *Ibid.*, at 126.

[61] *Ibid.*, at 127.

[62] Master Agreement between the Government of British Columbia and the British Columbia Government Employees Union (January, 1984) (hereinafter referred to as "BCGEU Master Agreement"). See, also, *Constitution Act*, R.S.B.C. 1979, c. 62, s. 25, which provides that no member of the Legislative Assembly shall accept from the Crown in right of the Province money from an office or employment to which the Crown has appointed him.

In British Columbia, the managerial and other employees who are not within the bargaining unit — to whom we shall refer hereafter as "excluded employees" — are subject to a somewhat greater degree of restraint in respect of their ability to engage in political activity than employees within the bargaining units. In the discussion that follows, we shall restrict our examination to the position of excluded employees and employees in the BCGEU. We shall not discuss separately the position of nurses and professional employees, as it is very similar to that of members of the BCGEU.[67]

With respect to federal and provincial elective office, the only restriction under the BCGEU Master Agreement on the right of employees to engage in political activity on their own time as campaign workers is that imposed by the oath of office that is required to be taken under the *Public Service Act*.[68] By taking the oath, an employee promises to perform faithfully and honestly all the duties of his office and to preserve confidentiality with respect to any matter or thing that comes to his knowledge by reason of his employment.[69]

The only matter relating to federal and provincial political activity that is addressed in any detail in the BCGEU Master Agreement is that of candidacy for election to office. The BCGEU Master Agreement stipulates that, if nominated as a candidate, the employee must be granted, on written request, leave of absence without pay for a maximum period of ninety days. The employee, however, is not required to take a leave. If elected, the employee, on written request, must be granted a leave of absence without pay for a maximum period of five years. If not elected, the employee is allowed to return to his or her former position.[70]

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[63] Master and Subsidiary Agreements between the Government of British Columbia and the Professional Employees Association (June 19, 1984) (hereinafter referred to as "PEA Master Agreement").

[64] Fifth Nurses Master and Component Agreements between the Government of British Columbia and the Registered Psychiatric Nurses Association of British Columbia and the British Columbia Nurses' Union (hereinafter referred to as "Nurses Master Agreement").

[65] R.S.B.C. 1979, c. 346, s. 1(1), as am. by S.B.C. 1980, c. 60, s. 155 and S.B.C. 1982, c. 43, s. 29.

[66] See Treasury Board Order No. 40/79, promulgated as B.C. Reg. 508/79 (hereinafter referred to as "Treasury Board Order").

[67] See Boyer, *Political Rights: The Legal Framework of Elections in Canada* (1981), at 244.

[68] R.S.B.C. 1979, c. 343, s. 42. See BCGEU Master Agreement, *supra*, note 62, cl. 32.07(b). The oath of office is set out in B.C. Reg. 632/76.

[69] See discussion *infra*, this ch., sec. 2(b)(ii).

By way of contrast, in the case of political activity at the municipal or local level, the BCGEU Master Agreement establishes two conditions that must be satisfied where an employee seeks election to municipal or school board office: (1) the duties of the municipal or school board office, other than the regular council or board meetings, must not impinge on normal working hours; and (2) there must be no conflict of interest between the duties of the municipal or school board office and the duties of the public service position.[71] Where the meetings of the municipal council or school board are held during the employee's normal working hours, the ministry, upon written request, must give the employee leave without pay to attend them. The BCGEU Master Agreement further provides that, before employees may receive remuneration in a municipal or school board office, they must seek the approval of the Public Service Commission in accordance with section 50 of the *Public Service Act*.[72]

As we have indicated, the position of excluded employees is addressed in the Treasury Board Order governing the terms and conditions of their employment. The Order deals only with the issue of candidacy. Section 10(1) of the Order provides that, before seeking nomination to a public office, an employee must obtain written approval from the Public Service Commission "to ensure that there is no conflict of interest between the employee's duties as a public servant and the office to which he seeks nomination". Although not stated specifically, the general reference to "public office" would seem to comprehend municipal office, as well as the provincial legislature and the House of Commons. On its own initiative or upon the request of the employee, the Commission may direct the employee's ministry to grant a leave of absence without pay for up to ninety days immediately preceding the date of the election, in order to allow the employee to seek nomination or election to office.[73]

Where an excluded employee is elected to a municipal or school board office, the employee "must ensure that the duties of that office do not impinge on the employee's normal working hours".[74] Where an employee is elected as a Member of the Legislative Assembly or the House of Commons, upon written request to the Public Service Commission, the employee must be granted a leave of absence without pay for a maximum of five years.[75] The employee, we note, is not required to take leave. Thus, he or she may be a Member of the Legislative Assembly and retain an active position in the public service. Where, however, an employee becomes either a provincial or federal Minister of the Crown, employment as a public service employee is deemed to be terminated.[76]

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[70] See BCGEU Master Agreement, *supra*, note 62, cls. 32.07(b) and 20.04. Professional employees and nurses are subject to the same rules, except that there is no stipulation that the period of leave following nomination is to be 90 days: see PEA Master Agreement, *supra*, note 63, cl. 36.03(b), and Nurses Master Agreement, *supra*, note 64, cl. 30.06(b).

[71] See BCGEU Master Agreement, *supra*, note 62, cl. 32.07(a).

[72] Professional employees are subject to the same rules: see PEA Master Agreement, *supra*, note 63, cl. 36.03(a). The rules applicable to nurses differ somewhat: see Nurses Master Agreement, *supra*, note 64, cl. 30.06(a).

[73] See Treasury Board Order, *supra*, note 66, s. 10(2).

b. Alberta

The Code of Conduct and Ethics for the Public Service of Alberta was filed in the Legislature in May, 1978[77] as a statement of government policy.[78] It addresses, among other matters, political activity and public statements by public servants.

With respect to political activity, the Code distinguishes between employees at the executive management level and the rest of the public service. Employees who occupy positions in the "Executive Officer" classes of the government's Management Compensation Plan and employees who are referred to in Order in Council 709/82, as amended, are subject to certain restrictions on their entitlement to participate in partisan political activity, which do not apply to the balance of employees.[79] For ease of reference, we shall refer to the former as "executive managerial employees". All employees, however, are subject to a general prohibition "that they must not participate directly in the solicitation of contributions within the meaning of the *Election Finances and Contributions Disclosure Act*, the *Election Expenses Act (Canada)*, or the *Canada Elections Act*,"[80] except if they are on leave of absence to run as candidates.

Executive managerial employees are prohibited from seeking nomination as candidates in federal or provincial elections and from holding office in a political party or constituency association.[81] While no other limitation is specified, apparently the prohibition is interpreted as precluding active public participation in partisan political activity by senior management. This would appear to comprehend canvassing on behalf of a candidate or a party, but would not embrace non-public activities such as membership in a party or answering a telephone on behalf of a candidate or a political party.[82]

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[74] *Ibid.*, s. 10(3).

[75] *Ibid.*, s. 10(4).

[76] *Ibid.*, s. 10(5).

[77] Alberta, *A Code of Conduct and Ethics for the Public Service of Alberta* (undated) (hereinafter referred to as "Alberta Code"). Under the *Legislative Assembly Act*, S.A. 1983, c. L-10.1, s. 27(2), a person is not disqualified from being a member of the Assembly by reason of holding an office or place of employment from the Crown in right of Alberta. If, immediately before becoming a member, a person is an employee of the Crown or the holder of an office listed in the Schedule to the Act, on becoming a member he or she ceases to be an employee or hold that office, as the case may be: *ibid.*, s. 27(3).

[78] *Alta. Leg. Ass. Deb.*, May 15, 1978, at 1215.

[79] See Alberta Code, *supra*, note 77, para. 5.2. For a description of the two Executive Officer classes and the positions to which reference is made in O.C. 709/82, see Boyer, *supra*, note 67, at 245.

[80] Alberta Code, *supra*, note 77, para. 5.1.

While executive managerial employees may not become candidates in a federal or provincial election, they may be permitted to be candidates in a municipal election if they receive the approval of the Public Service Commissioner. In deciding whether to grant permission, the Public Service Commissioner must have regard to the general principles set out in the Code of Conduct and Ethics.[83]

The prohibition against the solicitation of contributions is the only restriction on participation in political activity at the provincial or federal level to which non-executive managerial employees are subject, except insofar as their candidacy is regulated. The Code requires employees who wish to run as candidates in a provincial or federal election to take a leave of absence without pay, beginning on the day after the writ for the election is issued or on the day that their candidacy is publicly announced, whichever is the later. Where an employee has publicly declared candidacy, the general restriction on soliciting contributions does not apply.[84]

Where an employee is elected to federal or provincial office, he or she must resign effective the last day before the commencement of the leave.[85] An employee who is not elected is entitled to return to the same or similar employment, effective the day after the election.[86]

Non-executive managerial employees are not subject to any restriction with respect to municipal politics, even in connection with the solicitation of contributions. However, if elected to office, they will be subject to the provisions of the Code governing outside employment. These provisions permit employees to take "supplementary employment", including self-employment, except where the employment exhibits one or more of the following characteristics:[87]

(a) causes an actual or apparent conflict of interest, or

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[81] *Ibid.*, para. 5.2.

[82] See Alberta, *Administrative Instructions in Support of the Code of Conduct and Ethics* (undated), at 7.

[83] See Alberta Code, *supra*, note 77, para. 5.7.

[84] *Ibid.*, para. 5.3.

[85] *Ibid.*, para. 5.4.

[86] *Ibid.*, para. 5.5.

[87] *Ibid.*, para. 3.1.

(b) is performed in such a way as to appear to be an official act, or to represent a Government opinion or policy, or

(c) unduly interferes through telephone calls, or otherwise, with regular duties, or

(d) involves the use of Government premises, equipment, or supplies, unless such use is otherwise authorized.

Employees are under a duty to notify their supervisors in writing as to the nature of the supplementary employment where it is evident that a conflict of interest might arise.[88] Employees are also prohibited from accepting monetary or other payment in addition to their normal salary or expenses for duties that they perform in the course of employment in the public service.[89]

With respect to public statements by employees, the Code evinces a concern only for maintaining the secrecy of information. While it appears to be envisaged that employees may communicate their views in a public fashion, the Code does not address whether, and the extent to which, employees are to be limited with respect to their entitlement to do so. The Code provides simply that "[e]mployees who speak or write publicly are responsible for ensuring that they do not release information in contravention of the oath of office set out in section 20 of the *Public Service Act*".[90]

c. *Saskatchewan*

The Saskatchewan *Public Service Act*[91] establishes four general mandatory guidelines, which apply to all political activity and to all public servants. These guidelines are set out in section 50(1) of the Act:

> 50.-(1) No person in the public service[92] shall:
>
> (a) be in any manner compelled to take part in any political undertaking, or to make any contribution to any political party, or be in any manner threatened or discriminated against for refusing to take part in any political undertaking; or

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[88] *Ibid.*, para. 3.2.

[89] *Ibid.*, para. 3.3.

[90] *Ibid.*, para. 6.1.

[91] *The Public Service Act*, R.S.S. 1978, c. P-42. See, also, *The Members of the Legislative Assembly Conflict of Interests Act*, S.S. 1979, c. M-11.2, s. 3(1), which provides that "[n]o person who holds any office or place of profit under the Crown or who is employed in any manner in the public service of the province for salary, wages, fees or emolument shall sit or vote in the Assembly, and the election of any such person as a member is void".

The Saskatchewan Public Service Commission has issued Conflict of Interest Guidelines that apply to all employees, classified and unclassified, appointed under *The Public Service Act*. These guidelines deal with financial conflicts of interest, addressing matters such as outside employment and management of investments, and thus are not relevant to the subject of this Reference.

[92] For a definition of "public service", see *The Public Service Act*, *supra*, note 91, s. 2(o).

(b) directly or indirectly use or seek to use the authority or official influence of his position to control or modify the political action of any other person; or

(c) during his hours of duty engage in any form of political activity; or

(d) at any time take such part in political activities as to impair his usefulness in the position in which he is employed.

In prescribing these standards, the Act does not distinguish between classes of public servant, or between federal and provincial politics, on the one hand, and municipal politics, on the other. This is not to suggest, however, that the position that the public servant occupies in the institutional hierarchy and the political arena in which he or she wishes to participate are wholly irrelevant factors in assessing the propriety of a particular political activity. On the contrary, these considerations would appear to have a bearing on the interpretation and application of the prohibition, contained in section 50(1)(d) of the Act, against taking part in political activities that impair the usefulness of a public servant in the position in which he or she is employed.

The test whether participation in a political activity would impair the usefulness of a public servant in his or her position applies to participation in all of the political activities that we have considered in the course of this Report — candidacy for office, canvassing, solicitation of contributions, and otherwise actively supporting a party, candidate or cause. Where this test is satisfied and participation in a political activity is permitted, public servants must ensure that they do not run afoul of the prohibitions against engaging in the activity during working hours and using their position improperly "to control or modify the political action of any other person".

The only political activity that is addressed specifically in the Act is candidacy for elective office. A person in the public service who wishes to become a candidate is entitled to take a leave of absence for thirty days prior to the date of the election.[93] This entitlement is not confined to election to the House of Commons and to the Legislative Assembly, but extends to all types of "public office". We have been informed that, as a matter of practice, leave may be granted for a period longer than thirty days prior to the election date in order to allow a person to seek nomination as a candidate.

It would appear also that discretionary leave has been granted to persons who wish to participate actively in election campaigns. Moreover, it has been suggested that public servants at all levels, including deputy ministers, have taken leave to run for office or to campaign actively for a party or candidate.[94]

Where a person who holds an office or place of profit under the government, or who is in any manner employed in the provincial public service, is elected to the Legislative Assembly, "he shall be deemed to have resigned his office or place of profit under the Government or his employment in the public service of the province on the day immediately prior to the day on which he was elected",[95] unless the result of the election is set aside. In such a case, the person elected will be deemed to have been on a leave of absence without pay from the day immediately prior to the day of the election until the day on which the results of the election were reversed.

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[93] *Ibid.*, s. 50(2).

[94] See Riddell, "Policies on Political Leave in Saskatchewan", unpublished paper presented at the National Conference on Public Sector Management, held at Victoria, British Columbia (April 20-23, 1986).

An interesting aspect of the Saskatchewan *Public Service Act* is that it seeks to prevent coercion in relation to the exercise of political rights. It will be recalled that section 50(1)(a) prohibits a person in the public service from being "in any manner compelled to take part in any political undertaking, or to make any contribution to any political party, or ... in any manner threatened or discriminated against for refusing to take part in any political undertaking". The intention of this prohibition appears to be to ensure that individuals are free to choose to participate in politics without being subject to improper pressures exerted by persons who occupy a position of influence and power in relation to them. Section 50(1)(b) provides that "[n]o person in the public service shall ... directly or indirectly use or seek to use the authority or official influence of his position to control or modify the political action of any other person".

We began this discussion by noting that the general guidelines established by section 50(1) of the Saskatchewan *Public Service Act* apply to all political activity. Hence, these standards would govern political activity of an entirely nonpartisan character, whether related to a municipal election or to a single issue. For example, public expression of political views would be subject to the requirement that it not impair the usefulness of the person in his position, irrespective of the context in which the views are communicated.

d. Manitoba

The Manitoba *Civil Service Act*[96] is concerned primarily with political activity in relation to elections.

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[95] *The Public Service Act*, *supra*, note 91, s. 50(3)(a), as am. by S.S. 1980-81, c. 83, s. 41. See, also, *The Members of the Legislative Assembly Conflict of Interests Act*, *supra*, note 91, s. 3.

[96] *The Civil Service Act*, R.S.M. 1970, c. C110, s. 44, as en. by S.M. 1974, c. 46, s. 11. For a definition of "civil service", see s. 2(1)(e), as am. by S.M. 1974, c. 46, s. 1. See, also, *The Legislative Assembly Act*, R.S.M. 1970, c. L110, s. 13, which provides that "no person accepting or holding any office, commission or employment, or performing any duty, in respect of which any salary, fee, payment, allowance, or emolument is payable from the Crown in right of the province, is eligible to be nominated for, or elected as a member of, the Legislative Assembly; nor shall he sit or vote in the assembly during the time he holds the office, commission, or employment, or he is performing the duty, or the salary, payment, allowance, or emolument, is payable to him."

On March 1, 1984, the Manitoba government issued its Conflict of Interest Policy for Manitoba Government Employees. Like the Saskatchewan Conflict of Interest Guidelines, this Policy deals with matters beyond the purview of this Reference.

Section 44 of the Act deals with political activity and provides as follows:

> 44.-(1) Nothing in this Act, or any other Act of the Legislature, prohibits an employee in the civil service or a person employed by any agency of the government
>
> (a) from seeking nomination as or being a candidate or supporting a candidate or political party in a provincial or federal general election or by-election, and if elected, from serving as an elected representative in that public office; or
>
> (b) from speaking or writing on behalf of a candidate or a political party in any election, or by-election, if in doing so he does not reveal any information or matter concerning the department, branch or agency in which he is employed or any information that he has procured or which comes to his knowledge solely by virtue of his employment or position.

This provision extends to a broad range of government employees; it comprehends not only the employees of departments, but also those of boards, agencies, commissions, and other bodies.[97]

While section 44(1) seems to contemplate the exercise by government employees of considerable political rights in relation to elections, its precise effect is not clear. In stating that no Manitoba statute prohibits the enumerated political activities, section 44(1) does not confer an absolute right to engage in these activities, for any limitation having its source in the common law, the oath of office,[98] or constitutional convention would remain unaffected. For example, while a civil servant apparently may speak or write on behalf of a party in an election, it may be doubted whether this "right" extends to public criticism of the policies and programmes of his own department — conduct that would otherwise appear to be a violation of the common law duty of loyalty.

Section 44(1) of the Act does not apply to deputy ministers, or to other classes or groups of employees designated in the regulations.[99] To date, no such regulations have been made, leaving deputy ministers the only persons to whom the benefit of section 44(1) does not extend.

The Act contains a general prohibition against the solicitation of funds for a provincial or federal political party or candidate.[100]

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[97] For a discussion of the applicability of s. 44(1) and the meaning of the terms "employee", "civil service", and "agency of the government", see Boyer, *supra*, note 67, at 248-50.

[98] Section 42(b) of *The Civil Service Act*, *supra*, note 96, requires employees to take an oath in which they swear to "faithfully and honestly fulfil the duties which devolve upon [them]".

[99] *Ibid.*, s. 44(2).

[100] *Ibid.*, s. 44(4).

Under the Manitoba Act, candidacy for federal or provincial office is subject to regulation. A person who proposes to become a candidate in a provincial or federal election is required to apply to his or her Minister for a leave of absence without pay. The application must be approved. The duration of the leave depends on whether the person is nominated as a candidate. Where a person is nominated, the period of leave is not longer than that commencing on the day on which the writ for the election is issued and ending ninety days after the day on which the results of the election are officially declared. Where a person is not nominated as a candidate, the period of leave is not shorter than that commencing on the day on which the writ for the election is issued and ending on the day fixed by law for the nomination of candidates.[101]

The Act also addresses the effect of the outcome of the election on the tenure of the employee. Where the employee fails to be elected, he or she is entitled to be reinstated to the position held immediately prior to the date of the leave of absence if an application is made within ninety days from the date on which the results of the election are declared. In such a case, the period of service will be deemed to be unbroken for all purposes.[102] Where the person is elected to the House of Commons or the Legislative Assembly, or is appointed as a member of the Executive Council, he or she is entitled, upon application, to a leave of absence without pay for a period not exceeding five years from the date of the election or appointment, or for a shorter period if he or she resigns or the term of office expires or is terminated.[103]

Like the Saskatchewan *Public Service Act*, the Manitoba *Civil Service Act* seeks to ensure that persons engage in political activity of their own volition, free from improper pressure exerted by those in positions of authority. Section 44(8) of the Act prohibits coercion and intimidation directed to persuading individuals to support or not to support a candidate or political party by persons in a supervisory capacity or who are authorized to employ, promote, or reclassify a person in the civil service or in an agency of the government.

e. Quebec

At the end of 1983, the National Assembly passed the *Public Service Act*,[104] which replaced the *Civil Service Act*.[105] The new statute effected a major change in the position of public servants with respect to political activity. Under the *Civil Service Act*, there had been a general prohibition on partisan work in connection with a federal or provincial election.[106] Pursuant to the *Public*

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[101] *Ibid.*, s. 44(3).

[102] *Ibid.*, s. 44(5).

[103] *Ibid.*, s. 44(6).

[104] *Public Service Act*, S.Q. 1983, c. 55, as am. by S.Q. 1984, c. 27, ss. 66 and 67, and S.Q. 1984, c. 47, s. 203.

[105] S.Q. 1978, c. 15.

[106] *Ibid.*, s. 102.

Service Act, public servants may engage in partisan politics, provided that they adhere to certain standards prescribed in the Act.

The provisions of the Act respecting political activity and public comment are found in Chapter II, which is entitled "Rights and Obligations of Public Servants". Division I of the Chapter is entitled "Conditions of Service" and Division II is entitled "Political Activities". Both Divisions include sections that relate to the subject matter of this Reference.

Division I prescribes standards of ethics and discipline for public servants, of which several bear directly on the question of political activity and public comment. Section 10 states that "[a] public servant shall be politically neutral in performing his duties". Section 11 states that "[a] public servant shall act with reserve in any public display of his political opinions". Section 12 provides that "[n]othing in this Act prohibits a public servant from being a member of a political party, attending a political meeting or making, in accordance with the law, a contribution to a political party or a local association of a political party or to a candidate in an election". Also relevant are the duties of loyalty and impartiality that are imposed expressly on public servants by the Act.[107]

While Division II bears the general title "Political Activities", it deals only with candidacy for elective office, serving as an official agent of a candidate, and serving as a member of the staff of a Minister or a member of the National Assembly. Other political activities, then, whatever the level of government and whether partisan or nonpartisan, would appear to be permitted without regulation, subject to the general ethical standards set out in Division I.

A public servant who wishes to become a candidate in a provincial election must apply for leave without pay from the date of the writ ordering the election. Leave is a matter of entitlement. A public servant who wishes to be a candidate for any other elective public office is also entitled, upon application, to a leave without pay; however, there is no requirement to apply for leave, as in the case of a provincial election. The beginning and end of the period of leave is to be fixed by the deputy minister or the chief executive to whom the public servant is responsible. While the duration of leave is a matter of discretion, it must be sufficient to allow the public servant to become a candidate in due time and to conduct his election campaign.[108]

Where a public servant who has been granted leave is not nominated or, if a candidate, is not elected, he or she is entitled to resume the position previously held within thirty days of the nomination day or the day on which another person is declared elected, as the case may be.[109]

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[107] *Public Service Act*, *supra*, note 104, s. 5.

[108] *Ibid.*, s. 24. The rules governing candidacy and leave, set out in s. 24, apply to a public servant who wishes to be the official agent of a candidate in a provincial election: see *ibid.*, s. 25.

[109] *Ibid.*, s. 24.

In dealing with the situation where a public servant is elected to office, the *Public Service Act* distinguishes between election to the National Assembly and election to other offices. A public servant who is elected in a provincial election ceases to be subject to the *Public Service Act*, except for certain sections respecting classification[110] and sanctions for certain types of improper conduct.[111] While a Member of the National Assembly, the public servant retains the classification possessed on the day of the election.[112]

By contrast, a public servant who is elected to an elective public office other than the National Assembly — which, of course, would include the Parliament of Canada — has the choice whether to take partial leave or full leave without pay for the first term in order to carry on the duties of office. A public servant who is granted a full leave, like a public servant elected as a Member of the National Assembly, ceases to be subject to the *Public Service Act*, save for the same provisions respecting classification and sanctions, and retains the classification possessed on the date of election.[113]

Where a public servant is employed in certain staff positions — for example, as a member of the office staff of a Minister or a member of the staff of a Member of the National Assembly — he or she ceases to be subject to the *Public Service Act*, except for the provisions respecting classification and sanctions. While employed on an office staff or as a member of the staff of a Member, the public servant retains the classification possessed at the time of appointment to the staff.[114]

Under the *Public Service Act*, public servants enjoy a right of reinstatement in the public service. During the period that a public servant holds, on a full time basis, an elective public office, or carries out duties on the office staff of a Minister or on the staff of a Member, an application may be made to the *Office des ressources humaines* for an opinion concerning the classification that could be assigned should the right to return to the public service be exercised. In giving the opinion, account must be taken not only of the classification of the public servant on the day that he or she was elected or was appointed to the staff position, but of the experience and formal training that has been acquired since he or she left the public service.[115]

If the public servant ceases to be a Member of the National Assembly, ceases to hold another elective office, or ceases to be employed in a staff position, that person has a right "to require the *Office des ressources humaines* to reexamine his qualifications and to place him by priority in a position commensurate with his qualifications."[116] In order to exercise this right, the requisition must be made in writing and received not later than sixty days after the public servant ceases to hold the office to which he or she has been elected or appointed.[117]

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[110] *Ibid.*, ss. 29 and 30. See, also, *An Act respecting the National Assembly*, S.Q. 1982, c. 62, s. 58(1), which provides that employment with the government or one of its departments is incompatible with the office of a Member of the National Assembly.

[111] *Public Service Act*, *supra*, note 104, ss. 129-31.

[112] *Ibid.*, s. 26.

[113] *Ibid.*, s. 27.

[114] *Ibid.*, s. 28.

[115] *Ibid.*, s. 29.

Should the *Office des ressources humaines* be unable to place the public servant, "he is placed on reserve at the Office, and is under its responsibility until he is placed."[118]

Finally, the *Public Service Act* seeks to prevent coercion of public servants. Section 130 provides that "[e]very person who uses intimidation or threats to induce a public servant to engage in partisan work or to punish him for refusing to do so is guilty of an offence and liable, in addition to costs, to a fine of $500 to $5,000".

f. New Brunswick

In New Brunswick, the restrictions on political activity by public servants are contained in the *Civil Service Act*.[119] The relevant provisions of this Act are very similar to those of the federal *Public Service Employment Act*, discussed earlier in this chapter, and therefore need not be elaborated here.[120]

g. Nova Scotia

The Nova Scotia *Civil Service Act*[121] is concerned with partisan political activity.

Section 34(2) of the Act contains a general prohibition against a deputy head and an employee[122] engaging in partisan work in connection with a federal or provincial election and against contributing, receiving or in any way dealing with money for any party funds. However, it is made clear that the ban on "partisan work" does not prevent a deputy head or employee from voting in an election if the person has a right to vote under "the laws governing the election".[123]

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[116] *Ibid.*, s. 30.

[117] *Ibid.*

[118] *Ibid.*, s. 31.

[119] S.N.B. 1984, c. C-5.1, s. 27.

[120] But see s. 27(5) of the *Civil Service Act*, *ibid.*, which provides that, in the event of a violation of any provision of s. 27, a deputy head or an employee *must* be dismissed from the civil service. Under the federal Act, there is no requirement of dismissal if there is a contravention of s. 32. A second difference is that the New Brunswick Act does not contain the procedure for conducting an inquiry into an allegation that there has been a violation of s. 27. Compare *Public Service Employment Act*, *supra*, note 5, s. 32(6).

[121] *Civil Service Act*, S.N.S. 1980, c. 3.

[122] Section 2(f) of the Act defines "employee" as "a person appointed to the Civil Service". Section 2(g) defines "Deputy Head" as "the Deputy of the member of the Executive Council presiding over a department and all others whom the Governor in Council from time to time designates as having the status of Deputy Head".

Under the Nova Scotia legislation, no provision is made for candidacy at the federal or provincial level.[124] Yet, we observe that, while the prohibition on partisan political activity is extensive, it does not appear to be total. "Partisan work" is prohibited in connection with a federal or provincial election, but is not proscribed generally. By contrast, contributing, receiving, or in any way dealing with money for party funds is forbidden entirely, whether or not the activity is related to an election. It would appear, then, that partisan work divorced from the context of an election, other than contributing, receiving, or dealing with money, is not prohibited under the Act.

A person who violates the statutory prohibition on partisan political activity risks dismissal from the civil service.[125]

Section 35 of the Act deals with politics at the municipal level:

> 35. An employee, other than a Deputy Head or employee in a position or classification designated in the regulations, may be a candidate for election to any elective municipal office, including a school board, or actively work in support of a candidate for such office if
>
> (a) the candidacy, service or activity does not interfere with the performance of the employee's duties;
>
> (b) the candidacy, service or activity does not conflict with the interests of Her Majesty in the right of the Province; or
>
> (c) the candidacy, service or activity is not affiliated with or sponsored by a Federal or Provincial political party.

This provision was enacted in 1980, and seems to have been intended as a replication of section 11 of the Ontario *Public Service Act*.[126]

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[123] *Supra*, note 121, s. 34(1).

[124] But see *House of Assembly Act*, R.S.N.S. 1967, c. 128, s. 21(d), which provides that "no person who ... accepts or holds any office in the service of ... the Government of Nova Scotia to which any salary or wage of any kind is attached" is eligible as a member of the House unless he or she resigns such office before nomination.

[125] *Civil Service Act*, *supra*, note 121, s. 34(3).

[126] R.S.O. 1980, c. 418. However, s. 35 of the Nova Scotia Act uses the disjunctive "or", rather than the conjunctive "and", to separate the two final paragraphs. This appears to be the result of an error. Otherwise, active participation in municipal politics would be permitted if only one of the circumstances set out in the section were satisfied; for example, on a literal reading, the section would permit an employee to run as a candidate and serve in office if it did not interfere with the performance of his or her duties, even though service in the office would involve a conflict with the interests of Her Majesty in the right of the Province. There can be little doubt that such a state of affairs was not intended.

Another discrepancy between this section and s. 11 of the Ontario Act, which also

As we discussed in chapter 3, a recent decision has held that sections 34(2), 34(3), and 35(c) of the *Civil Service Act* are of no force and effect because they are inconsistent with certain rights guaranteed by the *Canadian Charter of Rights and Freedoms.*[127]

h. Prince Edward Island

Section 39 of the *Civil Service Act*[128] combines a general prohibition on partisan political activity, similar to that contained in the Nova Scotia *Civil Service Act,* with the general mandatory guidelines that are set out in the Saskatchewan *Public Service Act.* The latter, it will be recalled, apply to all types of political activity without distinction. Prior to the addition of these guidelines in 1962, civil servants were subject only to a general prohibition on partisan activity, breach of which would render them liable to dismissal.[129]

Section 39 of the Act provides as follows:

> 39.-(1) No person appointed by the Commission shall
>
> (a) be in any manner compelled to take part in any political undertaking or to make any contribution to any political party, or be in any manner threatened or discriminated against for refusing to take part in any political undertaking;
>
> (b) directly or indirectly use or seek to use the authority or official influence of his position to control or modify the political action of any other person;
>
> (c) during his hours of duty engage in any form of political activity;
>
> (d) at any time take such part in political activities as to impair his usefulness in the position in which he is employed; or
>
> (e) be debarred from voting at any federal or provincial election, if under the laws governing the election he has the right to vote; but no employee shall engage in partisan work in connection with any election, or contribute, receive, or in any way deal with any money for any party funds.
>
> (2) Any employee violating any of the provisions of clauses (1)(b), (c), (d) and (e) shall be dismissed from the civil service subject to appeal.

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appears to be an oversight, is that s. 35 omits to state that an employee may serve in an elective municipal office, as well as being able to be a candidate for that office.

[127] *Supra,* note 4. See *Fraser v. Attorney-General of Nova Scotia,* unreported (June 10, 1986, N.S.S.C., T.D.). See discussion *supra,* ch. 3, sec. 4(e).

[128] S.P.E.I. 1983, c. 4. See, also, *Legislative Assembly Act,* R.S.P.E.I. 1974, c. L-11, s. 16, as am. by S.P.E.I. 1980, c. 1, s. 12, which renders persons holding an office, commission, or employment in the provincial government ineligible to be members of the Legislative Assembly.

[129] Compare *The Civil Service Act,* S.P.E.I. 1953, c. 7, s. 17, and *The Civil Service Act,* S.P.E.I. 1962, c. 5, s. 66.

The guidelines specified in clauses (a)-(d) would apply to political activity that falls outside the general prohibition set out in clause (e). The prohibition in section 39(1)(e) may be broader than that in the Nova Scotia Act if the reference to "any election" is intended to comprehend a municipal election, as well as a federal and provincial election.

i. Newfoundland

In Newfoundland, an Order-in-Council,[130] made in 1975, governs political activity by persons employed in the public service.

With the exception of employees attached to the House of Assembly and certain assistants,[131] no employee[132] is entitled to engage, at any time, in any partisan political activity for or on behalf of any political party or candidate.[133] However, the Order-in-Council also allows an employee to run as a candidate or to campaign for nomination as a candidate for election in a federal or provincial election, provided that the employee resigns his or her position. If successful, the employee may apply subsequently for reinstatement in the public service, on the understanding that there is no obligation on the part of the government to reinstate.[134]

Pursuant to paragraph 3 of the Order-in-Council, employees, other than deputy ministers or assistant deputy ministers, may participate in municipal politics with the prior consent in writing of their Ministers, provided that such participation does not create any conflict of interest or interfere in any way with attendance at work or with the performance of official duties. If elected as a member of a municipal council, these conditions must be met and, in addition, the employee "[must] exercise tact and discretion at all times in any matter involving the Government".[135]

Employees are subject to certain general guidelines, similar to those established under the Saskatchewan *Public Service Act*,[136] and discussed earlier in this chapter.[137] The Order-in-Council makes it clear that, notwithstanding the limitations imposed on political activity, the right of an employee to vote at an election and to attend public political meetings outside official working hours remains intact. [138]

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[130] Order-in-Council 951-'75 (August 18, 1975) (hereinafter referred to as "Order"). See, also, *The Legislative Disabilities Act*, R.S.N. 1970, c. 202, s. 2(a), which renders persons holding any office, place or appointment or emolument from or under the provincial government ineligible to be elected, or to sit or vote, as members of the House of Assembly.

[131] Order, *supra*, note 130, para. 7 refers to "Special Assistants, Personal Assistants, and Private Secretaries to the Premier and to Ministers".

[132] Paragraph 1(a) of the Order, *ibid.*, defines "employee" as "a person employed in the Public Service who is paid salary or wages out of public funds voted by the Legislature but does not include Ministers of the Crown or Members of the House of Assembly".

[133] Order, *ibid.*, para. 7 allows teachers and instructors employed in government institutions to engage in partisan activity for or on behalf of any political party or candidate outside working hours or during periods when they are not required to perform their official duties so long as their participation does not impair their usefulness in the position in which they are employed.

[134] *Ibid.*, para. 2.

[135] *Ibid.*, para. 3.

An employee who is guilty of a breach of the Order-in-Council will be liable to whatever disciplinary action the Lieutenant-Governor in Council sees fit to impose in the circumstances.[139]

j. Yukon Territory

The entitlement of employees in the public service of the Yukon to become candidates for elective office, engage in political activity, and comment publicly is governed primarily by Part XI of the *Public Service Commission Ordinance*[140] and by the *Public Service Commission Regulations*.[141] Also relevant are the policy directives that deal with conflict of interest and with speaking in public and writing for publication, which have been issued by the Public Service Commission.[142]

The *Public Service Commission Ordinance* and the *Public Service Commission Regulations* contain detailed provisions relating to leave of absence for candidature, the period of leave, and an employee's right to return to his or her position. For our purposes, it is sufficient to note that an employee who wishes to seek nomination as a candidate, or to be a candidate, for election to the House of Commons or the Yukon Territory Council, must obtain a leave of absence from the Public Service Commissioner. Leave must be granted "where operational requirements permit".[143]

Under the *Public Service Commission Ordinance*, certain conduct is permissible in seeking nomination as a candidate or running as a candidate. Section 165(1) allows a person who has been granted leave to "speak, write or work on his own behalf or on behalf of a political party in a Federal or Territorial election or by-election," subject to two conditions. The employee must not "reveal any information that he has obtained or which comes to his knowledge solely by virtue of his employment or position in the Public Service" or "publicly criticize or oppose any government policy which he has been instrumental in formulating while an employee".

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[136] *Supra*, note 91.

[137] Compare paras. 4, 5, and 6 of the Order with s. 50(1) of the Saskatchewan *Public Service Act*, *supra*, note 91.

[138] See Order, *supra*, note 130, para. 9.

[139] *Ibid.*, para. 8.

[140] *Public Service Commission Ordinance*, O.Y.T. 1976 (2d), c. 2.

[141] *Public Service Commission Regulations*, Commissioner's Order 1976/165.

[142] See Yukon, Public Service Commission, Policy Directive No. 1/39, "Conflict of Interest" (August 1, 1978) (hereinafter referred to as "Conflict of Interest Policy"), and Policy Directive No. POL 1/33, "Speaking in Public and Writing for Publication" (May 27, 1982).

[143] *Public Service Commission Ordinance*, *supra*, note 140, s. 162. Before deciding whether operational requirements permit, the Public Service Commissioner must consult with the deputy head of the applicant: see *Public Service Commission Regulations*, *supra*, note 141, s. 184.

The balance of the Ordinance deals with the extent to which employees may engage in "political activity". The expression "political activity" is defined to mean "speaking, writing or working on behalf of or against a candidate or a person who is seeking nomination as a candidate or on behalf of a political party in an election or by-election".[144]

In determining the propriety of political activity, the Ordinance distinguishes between types of employee and between types of election. Except for a deputy head, every employee may engage in political activity in a federal election or by-election.[145] Except for "a person who has been identified as a managerial or confidential exclusion pursuant to the *Public Service Staff Relations Ordinance*", every employee may engage in political activity in a territorial election or by-election.[146] Persons identified within the managerial or confidential grouping are prohibited from engaging in political activity in territorial elections or by-elections,[147] although they may attend political meetings;[148] however, political activity in connection with federal elections or by-elections is permitted. A deputy head cannot seek nomination as or be a candidate for or support or work on behalf of any candidate or political party in a federal or territorial election or by-election, or a municipal election or by-election. Nor can a deputy head contribute funds to a candidate or political party.[149]

Entitlement to engage in political activity is subject to two overriding rules. First, there is a prohibition on employees soliciting funds for a political party or a candidate for election as a member of the House of Commons or the Council of the Yukon Territory.[150] Secondly, as with a person who has been granted a leave of absence to seek nomination as a candidate or to be a candidate for election to the House of Commons or the Yukon Territory Council, no person may engage in a political activity if, in so doing, that person "(a) reveals any information that he has obtained or which comes to his knowledge solely by virtue of his employment or position in the Public Service; or (b) publicly criticizes or opposes any government policy which he has been instrumental in formulating while an employee''.[151]

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[144] *Public Service Commission Ordinance*, *supra*, note 140, s. 166(1).

[145] *Ibid.*, s. 167(1).

[146] *Ibid.*, s. 167(2). For the definition of the expression "person employed in a managerial or confidential capacity", see *Public Service Staff Relations Ordinance*, O.Y.T. 1970 (2d), c. 1, s. 2(1).

[147] *Public Service Commission Ordinance*, *supra*, note 140, s. 169(1).

[148] *Ibid.*, s. 169(2).

[149] *Ibid.*, s. 169(3).

[150] *Ibid.*, s. 168(1).

In the Ordinance, very little attention is given expressly to municipal elections. As indicated, a deputy head is prohibited from being a candidate in a municipal election and from supporting or working on behalf of a candidate or party in such an election. The general prohibition against a deputy head contributing funds to a candidate or party would seem to comprehend municipal politics.

The Regulations address the propriety of political involvement at the municipal level. Section 189 provides that ''[a]n employee other than a Deputy Head may seek nomination as a candidate as a municipal councillor, trustee of a local improvement district or member of a school committee and may speak, write or work on his own behalf or on behalf of a candidate for municipal office if in doing so the employee does not reveal any information which he has obtained or which comes to his knowledge solely by virtue of his employment or position in the Public Service''. A further limitation on holding a municipal office may be found in the Public Service Conflict of Interest Guidelines. Among the several guidelines is the enjoinder that public servants ''should hold no outside office or employment that could place on them demands inconsistent with their official duties or call into question their capacity to perform these duties in an objective manner''.[152]

Employees who violate the provisions of Part XI of the *Public Service Commission Ordinance* risk the application of sanctions. Section 170(1) of the Ordinance states that, in such a case, the employee is liable to suspension or dismissal by the Public Service Commissioner.[153]

k. Northwest Territories

Section 33 of the *Public Service Ordinance*[154] imposes certain restrictions on both political activity and public comment. In so doing, it distinguishes between a class of restricted employees and the balance of the public service, placing more onerous restrictions on the former.

Section 33(1) provides that all employees are prohibited from engaging in the following activities:

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[151] *Ibid.*, s. 168(2).

[152] Conflict of Interest Policy, *supra*, note 142, para. 5, at 2.

[153] Section 190 of the Regulations, *supra*, note 141, is precisely to the same effect.

[154] R.O.N.W.T. 1974, c. P-13, s. 33, as en. by O.N.W.T. 1983 (1st Sess.), c. 12, s. 1. See, also, *Elections Ordinance, 1978*, O.N.W.T. 1978 (3d Sess.), c. 3, s. 19(1)(e), which renders ineligible as candidates for election to the Territorial Council ''every person who accepts or holds any office, commission or employment, permanent or temporary, in the service of the Government ... of the Territories to which any salary, fee, wages, allowance, emolument or profit of any kind is attached, during the time he is so holding any such office, commission or employment''.

1. personally soliciting funds for a territorial or federal political party or candidate;

2. during working hours, engaging in any political activity for or on behalf of a territorial or federal political party or a candidate;

3. using the premises, air charters, supplies, equipment, or services belonging to the government of the Northwest Territories for purposes of any political activity unless the premises are leased residential premises;

4. displaying or distributing federal or territorial campaign literature or other promotional material in any office or premises belonging to the government of the Northwest Territories unless the premises are leased residential premises;

5. publicly criticizing the policies of the government of the Northwest Territories unless on a leave of absence granted pursuant to subsection (4);

6. being a candidate in a provincial, territorial or federal election except where leave is granted pursuant to subsection (4); or

7. serving as an official agent for or executive officer of a territorial political pary, territorial riding, or territorial association.

Section 33(2) provides that employees in the restricted classification designated in the regulations to the Act are subject, in addition, to a prohibition in regard to the following activities:

1. being a candidate in a provincial, territorial, or federal election unless the employee resigns from the public service prior to becoming an official candidate;

2. speaking in public or expressing views in writing for distribution to the public on any matter that forms part of the platform of a territorial or federal political party, including any criticism of candidates, positions or policies;

3. attending any meeting of a territorial or federal political party as a voting delegate;

4. serving as executive officer of a federal political party, riding, or association; or

5. campaigning on behalf of or otherwise actively working in support of a territorial or federal political party or candidate.

Section 33(3) states that the prohibitions set out in section 33(1) and (2) are not violated by a person only by reason of his or her attendance at a political meeting, membership in a political party, or contribution of money to a political candidate or party.

Under the *Public Service Ordinance*, the Public Service Commissioner must grant to employees, other than persons designated in the regulations as restricted, a leave of absence without pay to seek nomination as a candidate and to be a candidate for election. The period of leave ends on the day on which the results of the election are declared officially or an earlier day, if the employee has ceased to be a candidate, provided that written application is made to the Commissioner. On becoming an official candidate, leave must be taken. Upon granting a leave of absence, the Commissioner must publish notice of it in the Northwest Territories Gazette and in "a widely distributed N.W.T. newspaper available to the public". If elected to the Territorial Council, the Parliament of Canada, or a provincial legislature, the person ceases to be an employee.[155]

Finally, section 33(8) provides that "[a] contravention of subsection (1) or (2) shall be deemed to be sufficient cause for such disciplinary measures as the Commissioner deems appropriate".

(b) CONFIDENTIALITY

(i) Federal

The law governing the extent to which employees of the federal government are subject to a duty of confidentiality may be derived from various statutes, as well as from the applicable common law, which we reviewed in chapter 3.[156]

a. Oath of Secrecy

Pursuant to the *Public Service Employment Act*,[157] every employee and every deputy head[158] must take and subscribe the oath or affirmation of office and secrecy that is set out in Schedule III to the Act.[159] By this oath or affirmation, the employee promises to fulfil his or her duties faithfully and honestly and "not, without due authority in that behalf, [to] disclose or make known any matter that comes to [his or her] knowledge by reason of such employment". This oath, like the oath of office and secrecy required under the Ontario *Public Service Act*,[160] imposes only a moral obligation on the person who takes it, as no consequences are specified in the event of its contravention.[161] However, disciplinary measures may be taken in response to an unauthorized disclosure.

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[155] *Public Service Ordinance*, *supra*, note 154, s. 33(4)-(7).

[156] *Supra*, ch. 3, sec. 2(b)(iii).

[157] *Supra*, note 5.

[158] For the definition of "deputy head", see *Public Service Employment Act*, *ibid.*, s. 2(1).

[159] *Ibid.*, s. 23, and Schedule III.

[160] *Supra*, note 126, s. 10(1).

[161] For a discussion of the oath under the Ontario Act, see ch. 3, sec. 3(b)(i)a.(1)i. There

b. Official Secrets Act

Employees are also subject to the *Official Secrets Act*,[162] which makes the wrongful communication of government information a criminal offence, punishable upon conviction by imprisonment for a term not to exceed fourteen years. As we explained in chapter 3,[163] section 4(1)(a) of the Act relates to the communication of information, and provides, in part, as follows:

> 4.-(1) Every person is guilty of an offence ... who, having in his possession or control any secret official code word, or pass word, or any sketch, plan, model, article, note, document or information that ... has been entrusted in confidence to him by any person holding office under Her Majesty, or that he has obtained or to which he has had access ... owing to his position as a person who holds or has held office under Her Majesty...
>
> (a) communicates the code word, pass word, sketch, plan, model, article, note, document or information to any person, other than a person to whom he is authorized to communicate with, or a person to whom it is in the interest of the State his duty to communicate it;...

In chapter 3, we observed that the meaning of this provision is unclear, insofar as there is uncertainty whether it applies only to information that is "secret official", or to all government information obtained in the course of employment.[164]

c. Criminal Code

In chapter 3, we briefly discussed section 111 of the *Criminal Code*,[165] which provides that "[e]very official who, in connection with the duties of his office, commits fraud or a breach of trust is guilty of an indictable offence and is liable to imprisonment for five years, whether or not the fraud or breach of trust would be an offence if it were committed in relation to a private person". We explained that, while there is no authority directly on the issue, it would appear that an unauthorized disclosure by a provincial Crown employee of information that he or she is under a duty not to reveal, might be regarded as a breach of trust in violation of the section.[166]

d. McDonald Commission Report

In 1979, in its First Report, the McDonald Commission[167] proposed that

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are, in addition, certain special oaths of secrecy: see, for example, *Atomic Energy Control Act*, R.S.C. 1970, c. A-19, s. 18(1); *Auditor General Act*, S.C. 1976-77, c. 34, s. 13(3); and *Canada Deposit Insurance Corporation Act*, R.S.C. 1970, c. C-3, s. 39(2).

[162] R.S.C. 1970, c. O-3.

[163] *Supra*, ch. 3, sec. 3(b)(ii)b.

[164] *Ibid.*

[165] R.S.C. 1970, c. C-34.

[166] *Supra*, ch. 3, sec. 3(b)(ii)a.

[167] Canada, Commission of Inquiry Concerning Certain Activities of the Royal Canadian

section 4 of the *Official Secrets Act* be fundamentally changed. The Commission was of the view that it was improper to include offences relating to the unauthorized disclosure of information in a statute dealing with espionage offences; in its view, the two types of offence were concerned with very different kinds of conduct and "different levels of threat to the state."[168] Accordingly, it proposed that espionage be addressed by new espionage legislation and that unauthorized disclosure of government information be addressed by separate legislation.

The McDonald Commission regarded section 4 of the *Official Secrets Act* as an inappropriate response to the unauthorized disclosure of government information. It considered that the section provided unnecessarily for criminal liability in many circumstances that could be handled by internal disciplinary measures. In its view, criminal liability should not be imposed for all unauthorized disclosure of government information, but only in relation to certain kinds of information. The types of information within its mandate that the McDonald Commission identified related to security and intelligence and to law and order.

The Commission's basic recommendation was that "new legislation with respect to the disclosure of government information should make it an offence to disclose without authorization government information relating to security and intelligence."[169] With respect to information relating to "law and order", it recommended as follows:[170]

> [N]ew legislation with respect to the unauthorized disclosure of government information should make it an offence to disclose government information relating to the administration of criminal justice the disclosure of which would adversely affect:
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> (a) the investigation of criminal offences;
>
> (b) the gathering of criminal intelligence on criminal organizations or individuals;
>
> (c) the security of prisons or reform institutions;
>
> or might otherwise be helpful in the commission of criminal offences.

It is of interest to note that the McDonald Commission also proposed, as a defence to a charge of unauthorized disclosure of information relating to the administration of criminal justice, what is in essence a "whistleblowing" defence.[171] It recommended that "it should be a defence to such a charge if the

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Mounted Police, *First Report: Security and Information* (1979) (hereinafter referred to as "McDonald Commission Report").

[168] *Ibid.*, at 9.

[169] *Ibid.*, at 24.

[170] *Ibid.*, at 24-25.

[171] See discussion *infra*, ch. 6, sec. 7(e).

accused establishes that he believed, and had reasonable grounds for believing the disclosure of such information was for the public benefit."[172]

Of the various matters addressed by the McDonald Commission in relation to section 4,[173] two points deserve mention. First, the Commission was concerned that persons not be required to secure express authorization prior to every communication. Accordingly, it recommended that the proposed offence of unauthorized disclosure should provide that "a person shall not be convicted (a) if he had reasonable grounds to believe and did believe that he was authorized to disclose such information, or, (b) if he had such authorization, which authorization may be express or implied."[174]

Secondly, the Commission addressed the issue of inadvertent disclosure through lack of care. Its view was that, generally, reliance should be placed upon "vigilant administration and disciplinary action".[175] It recommended that "the failure to take reasonable care of government information relating to security and intelligence or to the administration of criminal justice not be an offence unless such conduct shows wanton or reckless disregard for the lives or property of other persons".[176]

e. Non-Disclosure Provisions

Various federal statutes include specific prohibitions relating to the communication of information acquired by government employees in the performance of their duties. Several of these provide that a violation of the relevant prohibition will constitute an offence, punishable on summary conviction.[177]

f. Access to Information Act

The *Access to Information Act* was enacted in 1982.[178] It confers a general right of access to records under the control of government institutions, subject to a series of exemptions that identify the types of record to which this right does not extend.[179] The Act defines the right of access and establishes the procedures that are to govern a request for access and its disposition. The exemptions to the right of access are either mandatory or permissive; the former prohibit the release of the records described therein, while the latter allow the head of the government institution to decide whether to grant access to the record.

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[172] McDonald Commission Report, *supra*, note 167, at 25.

[173] These include, for example, communication of information relating to security and intelligence or to the administration of criminal justice by those who receive the information, such as the press, and retention of government documents relating to these matters: see *ibid.*, at 25-26.

[174] *Ibid.*, at 25.

[175] *Ibid.*, at 27.

[176] *Ibid.*

[177] See, for example, ss. 251 and 314 of the *Bank Act*, being Part I of the *Banks and Banking Law Revision Act, 1980*, S.C. 1980-81-82-83, c. 40, as en. by s. 2 of the latter Act; *Canada Pension Plan*, R.S.C. 1970, c. C-5, s. 107, as am. by R.S.C. 1970, c. 33 (2d Supp.), s. 1; *Environmental Contaminants Act*, S.C. 1974-75-76, c. 72, s. 4(4), as en. by S.C. 1984, c. 40, s. 25; *Hazardous Products Act*, R.S.C. 1970, c. H-3, ss. 10(3) and 14; and *Department of Regional Industrial Expansion Act*, R.S.C. 1970, c. I-11, ss. 6.1(4) and 6.1(6), as en. by S.C. 1974-75-76, c. 59, s. 1.

[178] Being Schedule I of *An Act to enact the Access to Information Act and the Privacy Act, to amend the Federal Court Act and the Canada Evidence Act, and to amend certain other*

The *Access to Information Act* provides for third party intervention where the information relates to that party. It prescribes procedures for investigation of complaints by the Information Commissioner, and for review by the Federal Court in the event that access to a record has been refused following an investigation by the Information Commissioner.

The *Access to Information Act* deals with the statutory provisions that prohibit disclosure of information. Section 4(1) of the Act provides that the right of access to records under the Act is conferred "notwithstanding any other Act of Parliament". The general right of access is, however, subject, *inter alia*, to section 24(1) of the Act, which states that "[t]he head of a government institution shall refuse to disclose any record ... that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II." Schedule II lists thirty-seven statutes that include provisions requiring confidentiality. The Act contains a procedure for review of these provisions by a Parliamentary Committee.[180]

(ii) The Provinces and Territories

Except for Nova Scotia and Quebec, all Canadian provinces require their government employees to take and subscribe an oath of office that includes a promise to maintain confidentiality.[181] Leaving aside minor differences of language, in each oath the employee swears not to disclose or make known, without due authorization, any matter or thing that comes to his or her knowledge by reason of employment in the public service.[182]

Acts in consequence thereof, S.C. 1980-81-82-83, c. 111 (hereinafter referred to as "*Access to Information Act*"). See s. 1 of the main Act.

[179] See, generally, Rankin, "The New Access to Information and Privacy Act: A Critical Annotation" (1983), 15 Ottawa L. Rev. 1.

[180] A Parliamentary Committee has been established to review the administration of the Act on a permanent basis: see *Access to Information Act*, *supra*, note 178, s. 75. Within three years after the Act has come into force or, if Parliament is not sitting, within the first fifteen days thereafter that Parliament is sitting, the Committee must "cause a report to be laid before Parliament on whether and to what extent the provisions are necessary": see *ibid.*, s. 24(2).

[181] See *Public Service Act*, R.S.B.C. 1979, c. 343, s. 42, and B.C. Reg. 632/76; *Public Service Act*, R.S.A. 1980, c. P-31, s. 20(1); *The Public Service Act*, R.S.S. 1978, c. P-42, s. 18; *The Civil Service Act*, R.S.M. 1970, c. C110, s. 42; *Civil Service Act*, S.P.E.I. 1983, c. 4, s. 30(1); *Civil Service Act*, S.N.B. 1984, c. C-5.1, s. 22; and *Civil Service Act*, R.S.N. 1970, c. 41, s. 5.

[182] As in Ontario, it would appear that some provinces require special oaths of secrecy to be

Of the provinces having a general oath of secrecy, only Alberta specifies the consequences of a violation of its terms. Under the Alberta *Public Service Act*, an employee who, without due authorization, discloses or makes known any matter or thing that comes to his or her knowledge by reason of employment in the public service is guilty of an offence and liable to a fine of not more than $500.[183] In addition, the Alberta conduct and discipline regulations provide that, whether or not an employee has taken the official oath required under the *Public Service Act*, in the event of an unauthorized disclosure of "any matter that comes to his knowledge by reason of his employment, [he] shall be liable to disciplinary action".[184]

In the other provinces, where the consequences of a contravention of the oath of secrecy are not specified, an employee who makes an unauthorized disclosure of information risks the application of disciplinary measures.

As with the oath of office and secrecy required under section 10(1) of the Ontario *Public Service Act*, the meaning of these oaths is unclear. On a literal reading, each of them would appear to forbid any and all communication without prior authorization, regardless of the information imparted or the person to whom it has been communicated. Indeed, the language of each would appear to prohibit disclosure of information even between government employees.

The meaning of the oaths has not been adequately elucidated by the courts or arbitrators. In *Re Ministry of Attorney-General, Corrections Branch and British Columbia Government Employees' Union*,[185] the arbitrator considered the oath of office required under the British Columbia *Public Service Act*.[186] In this case, the oath had been taken by certain senior corrections officers who had publicly made statements critical of government policy, in the course of which they disclosed information that had been acquired during the course of their employment. As corrections officers, these employees were subject also to the Correction Centre Rules and Regulations, which prohibited the disclosure of

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taken: see, for example, *The Statistics Act*, S.M. 1971, c. 29, s. 6(1), and *Statistics Act*, R.S.B.C. 1979, c. 392, s. 4.

[183] Alberta *Public Service Act*, *supra*, note 181, s. 20(2).

[184] See *Bargaining Unit Conduct and Discipline Regulation*, s. 3, and *Conduct and Discipline Regulation*, s. 4.

[185] *Re Ministry of Attorney-General, Corrections Branch and British Columbia Government Employees' Union* (1981), 3 L.A.C. (3d) 140 (Weiler) (hereinafter referred to as "*Lehnert*"). See, also, *Re Thom and Department of Government Services (Yukon Territorial Government)*, unreported (January 18, 1985, Y.P.S.S.R.B., Williams). The Yukon Public Service Staff Relations Board allowed a grievance by an employee who had disclosed documents to the president of the provincial public service union, and had been suspended for one day for violating her oath of office and secrecy. The Board found that the unauthorized release was not "within the substance of the behaviour circumscribed by the Oath" (*ibid*., at 12). However, its brief discussion of the oath is conclusory, and does not cast light on its meaning.

[186] For a discussion of this case, see *supra*, ch. 3, sec. 2(b)(ii).

information, except as required in the performance of their duties, as authorized by the director, or as required by due process of law.[187]

The employees had been dismissed on the grounds of their public criticism and their breach of the oath of office. With respect to the latter ground, the arbitrator refused to find a violation of the oath, although he concluded that the employees had disclosed information that had been gained during the course of their employment. He explained that his "reluctance to accept the employer's position is due to the uncertainty which surrounds the meaning to be attributed to the words in the oath, how these obligations have been enforced in the past, the manner in which the oath is explained to employees when they are hired and, in particular, the meaning which one management official attached to the oath when it was explained to one of the grievors."[188] More specifically, he concluded that the language of the oath gave no real guidance concerning the extent of the obligation on employees not to disclose information.[189]

Although the arbitrator found the oath to be uncertain, he did conclude that it could not be interpreted to mean that any release of any information gained during employment would constitute a violation of the oath warranting discipline or discharge.[190]

As we have indicated, in Quebec and Nova Scotia, government employees are not required to take a general oath of office and secrecy. The absence of an oath does not mean, however, that government employees are not subject to a duty of confidentiality. In Quebec, as part of the standard of ethics and discipline established under the *Public Service Act*, public servants are bound to preserve confidentiality regarding any matter brought to their attention in the performance of their duties.[191] This duty is subject to legislation governing access to information and the protection of personal information.[192] Under the *Public Service Act*, a public servant who contravenes the standards of ethics and discipline is liable to disciplinary action, according to the nature and gravity of the fault; this may include dismissal.[193]

In Nova Scotia, civil servants are not governed by a general secrecy provision. However, they are considered to be subject to the same duty of confidentiality that, under the common law, applies generally to all employees by virtue of their employment relationship. In the event of an unauthorized disclosure of information, an employee will be liable to the application of disciplinary measures, including dismissal, depending on the particular circumstances of the case.

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[187] See *Correction Centre Rules and Regulations*, s. 8.

[188] *Lehnert*, *supra*, note 185, at 154.

[189] *Ibid.*, at 157-58.

[190] *Ibid.*, at 157.

[191] *Public Service Act*, *supra*, note 104, s. 6.

[192] See *An Act respecting Access to documents held by public bodies and the Protection of personal information*, S.Q. 1982, c. 30 (hereinafter referred to as "Quebec Access Act").

[193] *Public Service Act*, *supra*, note 104, s. 16.

In addition to oaths of secrecy, some provinces have enacted non-disclosure provisions that specifically forbid release of information.[194]

In certain provinces, the legislative framework respecting confidentiality has been altered by the enactment of freedom of information legislation. Except for the Nova Scotia *Freedom of Information Act*,[195] these statutes provide for a general right of access to documentary information, which is subject to various exemptions. These statutes address the relationship of the newly created right of access to the existing legislative regime governing confidentiality. In the New Brunswick *Right to Information Act*[196] and the Yukon *Access to Information Act*,[197] the matter is resolved by making the right to information subject to an exemption where "its release (a) would disclose information the confidentiality of which is protected by law".[198] The Newfoundland *Freedom of Information Act*[199] stipulates that there shall be no access to information in records "that are, subject to the provisions of any Act of the province, required to be kept confidential".[200] These statutes then subordinate the right of access to existing statutory provisions requiring secrecy.

A somewhat different approach has been taken in the Quebec *Act respecting Access to documents held by public bodies and the Protection of personal information*[201] and the Manitoba *Freedom of Information Act*.[202] The Quebec statute provides that it prevails "over any contrary provision of a subsequent general law or special Act unless the latter Act expressly states that it applies notwithstanding [the access statute]".[203] With respect to inconsistent provisions appearing in any general law or special Act, or in any regulation, the Act provides that, except for certain provisions listed in Schedule A to the Act, such provisions will cease to have effect three years after the coming into force of the section depriving them of effect.[204] Schedule A lists various provisions in ten statutes.

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[194] See, for example, *The Venereal Disease Prevention Act*, R.S.S. 1978, c. V-4, s. 19; *The Education and Health Tax Act*, R.S.S. 1978, c. E-3, s. 33, as am. by R.S.S. 1978 (Supp.), c. 21, s. 7, S.S. 1979, c. 69, s. 11, and S.S. 1983, c. 11, s. 25(8); *The Corporation Capital Tax Act*, S.S. 1979-80, c. C-38.1, s. 50(2); *Vital Statistics Act*, R.S.B.C. 1979, c. 425, s. 38; *Credit Reporting Act*, R.S.B.C. 1979, c. 78, s. 21; *The Statistics Act*, S.M. 1971, c. 29, s. 9(1)(b); and *The Vital Statistics Act*, S.M. 1982-83-84, c. 58, s. 41.

[195] *Freedom of Information Act*, S.N.S. 1977, c. 10. The Nova Scotia Act provides for access only to defined categories of information. For a description, see Ontario, *The Report of the Commission on Freedom of Information and Individual Privacy: Public Government for Private People* (1980) (hereinafter referred to as "Williams Commission Report"), Vol. 2, at 134-36.

[196] *Right to Information Act*, S.N.B. 1978, c. R-10.3. For discussion, see Williams Commission Report, *supra*, note 195, Vol. 2, at 136-38.

[197] *Access to Information Act*, S.Y.T. 1983, c. 12.

[198] *Right to Information Act*, *supra*, note 196, s. 6(a), and *Access to Information Act*, *supra*, note 197, s. 8(1)(a).

[199] *The Freedom of Information Act*, S.N. 1981, c. 5.

[200] *Ibid.*, s. 9(1)(g).

[201] *Supra*, note 192.

[202] *The Freedom of Information Act*, S.M. 1985, c. 6. Although this statute received Royal Assent on July 11, 1985, it has not yet been proclaimed in force.

The Manitoba *Freedom of Information Act* provides that provisions in other statutes and regulations that limit or prohibit access to a record are subject to the Act, and apply only to the extent that they fall within the exemptions to the general right of access.[205] However, it provides further that *The Freedom of Information Act* does not apply to the provisions governing records that are contained in five specified statutes.[206]

3. UNITED KINGDOM

(a) POLITICAL ACTIVITY

(i) Introduction

The system of government in Ontario, based, as it is, upon the Westminster model in Britain, renders self-evident the usefulness of a consideration of the British experience. Like public servants in Ontario, members of the British civil service are recruited and advanced on the basis of merit. Similarly, they enjoy the protection provided by the doctrine and practice of ministerial responsibility. Members of the British civil service, moreover, like their Ontario counterparts, are expected to provide the government with impartial advice and service, irrespective of the political philosophy of the party in power. This impartiality, as well as continuity in government administration, is maintained in Britain, as it is in Ontario, by ensuring the political neutrality of the civil service.

During the past thirty-eight years, political activity of Crown employees has become a topic of governmental inquiry in Britain on three occasions. In each case, the primary purpose of the inquiry was to develop a scheme in which restrictions are imposed where they are necessary in order to protect the impartiality of the civil service, but to remove such restrictions where political activity on the part of civil servants would involve no risk to the integrity of the civil service. The conclusions reached in each of these inquiries are discussed below.

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[203] Quebec Access Act, *supra*, note 192, s. 168.

[204] *Ibid.*, ss. 169-70.

[205] *The Freedom of Information Act*, *supra*, note 202, s. 65.

[206] *Ibid.*, s. 66.

(ii) The Masterman Report

a. General

On February 25, 1948, Sir Stafford Cripps, the Chancellor of the Exchequer, announced the establishment of an independent Committee, under the chairmanship of Mr. J.C. Masterman, "[t]o examine the existing limitations on the political activities (both national and local) which may be undertaken by civilian Government staffs, and to make recommendations as to any changes which may be desirable in the public interest".[207] While the Government agreed that an investigation into such issues was warranted, it was made clear to the Committee that the Government would be "totally opposed to any radical change in the non-political status of the Civil Service".[208]

Throughout its inquiry the Masterman Committee was mindful of two generally accepted, but nevertheless conflicting, principles: (1) that it is desirable for all citizens in a democratic society to be free to participate in public affairs, and for as many citizens as possible actively to do so, and (2) that there is a strong public interest in maintaining the impartiality of the civil service.[209] The nature of the Committee's task was summarized in the following terms:[210]

> The political neutrality of the Civil Service is a fundamental feature of British democratic government and is essential for its efficient operation. It must be maintained even at the cost of some loss of political liberty by certain of those who elect to enter the Service. Our problem has been to reconcile the preservation of the existing confidence in the traditional impartiality of the Service with the grant of freedom to exercise ordinary citizen rights to as many employees of the State as is compatible with the reputation of the Service for political impartiality.

b. Categorization of the Civil Service

The Masterman Committee concluded that, to accomplish the necessary balancing of interests, the civil service ought to be divided, on the basis of job grade, into two discrete groups. This hierarchical categorization was intended to distinguish between those grades that included employees whose political activities might jeopardize public confidence in, and the efficiency of, the service, and those grades that included employees whose political activities would involve no such risk.[211] It was accordingly recommended that a single, horizontal line of demarcation be drawn through the civil service. Above the line were to be those employees who, because of the nature of their work, must be prohibited from engaging in political activities, and below the line were to be those employees who could be granted political freedom without risk to the integrity of the civil service.[212]

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[207] United Kingdom, *Report of the Committee on the Political Activities of Civil Servants* (Cmd. 7718, 1949) (hereinafter referred to as "Masterman Report"), para. 1, at 5.

[208] *Ibid.*, para. 2, at 5.

[209] *Ibid.*, para. 37, at 13.

[210] *Ibid.*, para. 1, at 30.

[211] *Ibid.*, para. 53, at 19, and para. 2, at 31.

For the purpose of categorizing the civil service, the Masterman Committee identified four main groups of employees: (1) Administrative, Professional, Scientific, Technical, Executive, Clerical and Typing Grades; (2) Minor and Manipulative Grades, excluding the Post Office; (3) Post Office Manipulative Grades; and (4) Industrial Grades.

Civil servants in the Industrial Grades were said not to differ from employees in the industrial workforce generally. They were not regarded by members of the public as forming part of what is commonly perceived to be the "civil service" and, accordingly, employees in the Industrial Grades were placed below the line of demarcation.[213]

With certain minor exceptions,[214] civil servants in the Minor and Manipulative Grades, including those in the Post Office, were also placed below the line. This group included such employees as messengers, porters and cleaners. It was reasoned that in the course of their employment they exercised very little discretion, and in many ways were closer to the industrial grades than to the non-industrial grades. As a result, it was concluded that political activity on the part of such employees would not jeopardize the public interest.[215]

The remainder of the civil service (that is, employees in the Administrative, Professional, Scientific, Technical, Executive, Clerical and Typing Grades) was placed above the line. The Committee recognized that it may have been possible to permit certain of the individuals included within this broad group to engage in political activity, without thereby jeopardizing the public interest. However, the Committee ultimately rejected the notion that distinctions ought to be drawn between employees within this group. The conclusion was reached that, while a few individuals might benefit personally, the making of such distinctions would have an adverse effect upon public confidence, and any consequent harm done to the public service would outweigh any potential benefit. Thus, all employees within the Administrative, Professional, Scientific,

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[212] *Ibid.*

[213] *Ibid.*, paras. 55 and 56, at 19-20.

[214] The recommendation regarding Minor and Manipulative Grade employees was subject to two rather narrow exceptions. First, the Service Departments' Constabularies, although classified within the Minor and Manipulative Grades, were placed above the line. They were said to be in much the same position as the ordinary police. The Committee concluded that if such employees were free to engage in political activity, a suspicion would arise that political partisanship was affecting their judgment in the discharge of their official duties. Secondly, the majority of the Committee were of the opinion that certain supervisors within the Post Office Minor and Manipulative Grades should also be above the line. *Ibid.*, paras. 59 and 62, at 21-22, and para. 4, at 31.

[215] *Ibid.*, para. 58, at 20.

Technical, Executive, Clerical and Typing Grades were placed above the line, without distinction on the basis of job grade or duties.[216]

c. *Political Activity*

(1) Parliamentary Candidature and Service

The Masterman Committee recommended that all employees in grades below the line (that is, those in the Industrial and Minor and Manipulative Grades)[217] should be free to stand for election to Parliament, without the need for resignation from the civil service, unless elected. For the purpose of such candidature, it was suggested that employees be granted one month's special leave prior to the election. The Committee also recommended that successful candidates be given a right to reinstatement, provided they had ten years of service and had not been absent in Parliament for more than five years.[218]

Employees in grades above the line, on the other hand, would continue to be prohibited from standing for election to Parliament. The Committee concluded that to allow such employees to become Members of Parliament, and later return to the civil service, would be incompatible with the tradition of impartiality.[219]

(2) National Political Activities Other Than Candidature

At the time of the Masterman Report, industrial civil servants were already completely free to engage in all political activity, with the exception of Parliamentary candidature. The Committee was of the opinion that civil servants in the Minor and Manipulative Grades, assimilated to the position of industrials in the Masterman Report, should also be free to engage in all forms of political activity. Thus, the Committee concluded that all employees in grades below the line should be free to engage in all political activities, both national and local, subject to a prohibition against engaging in such activities while on duty, while on official premises, or while in uniform, and subject also to the *Official Secrets Act 1911*.[220]

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[216] *Ibid.*, para. 66, at 23. The Committee was presented with, and seems to have been persuaded by, five arguments against differentiating internally within these grades. First, it was argued that all such grades form a single entity. In each office, members of these grades work together as part of a single organization. To distinguish among them, it was concluded, would be arbitrary. Secondly, the movement of staff among the various government departments would make it difficult to provide treatment, on an exceptional basis, for employees engaged temporarily in duties unrelated to political concerns. Thirdly, if distinctions were made within these grades, an employee originally below the line, and thus free to engage in political activity, might be promoted to a position in which political activity is prohibited. While the individual might be quite willing thereafter to refrain from political activity, his past political activity might have a continuing effect. Fourthly, members of the public might perceive the views of even a junior civil servant as deserving of particular weight. Accordingly, it was concluded that, on the basis of public confidence, no clear internal distinctions could be made within these grades. Lastly, many junior civil servants routinely had contact with the public, and exercised some degree of discretion in making decisions that affect the personal lives of members of the public. *Ibid.*, para. 65, at 23.

[217] Subject to the exceptions noted *supra*, note 214.

[218] Masterman Report, *supra*, note 207, paras. 56 and 57, at 20, and para. 5, at 31.

[219] *Ibid.*, para. 68, at 24, and para. 5, at 31.

Members of grades above the line would be required to maintain a reserve in political matters. In respect of national politics, they would be required to avoid any public expression of views that might associate them prominently with any political party. The Committee essentially defined those political activities that were to be subject to restriction by specifically recommending that employees in the restricted category should not:[221]

(a) Hold any office (such as that of president, chairman, secretary, treasurer or committee member) in any party political organisation, national or local;

(b) Speak in public on matters of party political controversy;

(c) Write letters to the press, publish books or articles, or circulate leaflets setting forth their views on party political matters;

(d) Engage in canvassing in support of political candidatures.

(3) Critical Comment of a Nonpartisan Nature

While members of grades above the line would be required to maintain a reserve in political matters, the Committee concluded that such employees should not be prohibited from expressing opinions on matters of public interest, except where the individual's employing agency was involved, or where the issue had become one of party controversy. Such employees would be free to express their opinions on matters of public interest, provided they did so in their private capacity, and provided they maintained an appropriate reserve.[222]

(4) Local Political Activity

Primarily as a result of the increasing importance of party affiliation at the local level, the Committee rejected what "[i]deally ... would offer the only solution", that is, to permit only independent candidature, for local political office, to those who were above the line.[223] The Committee was clearly persuaded of the desirability of permitting civil servants above the line to participate in local government,[224] but found it impossible, under the then current circumstances, to make any permanent recommendations. Accordingly, an experimental period of five years was recommended, at the end of which time the position was to be reviewed. During the proposed experimental period, those civil servants in grades above the line who wished to participate in local government would be entitled to seek permission to do so from their department head. Such employees would continue to be bound by the convention requiring a reserve in political matters, and they would be prohibited from becoming involved in matters of national partisan political controversy. They would be permitted to speak in public, write to the press or otherwise publish, circulate or express their views in respect of local issues, but they would be required to act with moderation at all times. They would not be permitted, however, to canvass for or otherwise overtly support other party candidates for local office.[225]

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[220] *Ibid.*, para. 64, at 22, para. 70, at 24, and para. 6, at 31. The *Official Secrets Act 1911*, 1 & 2 Geo. 5, c. 28, is discussed *infra*, this ch., sec. 3(b)(i).

[221] Masterman Report, *supra*, note 207, para. 70, at 24.

[222] *Ibid.*, para. 71, at 25, and para. 8, at 31.

[223] *Ibid.*, para. 84, at 28, and para. 10, at 32. Employees in grades below the line, of course, would be free to engage in all forms of political activity, both national and local. See *supra*, this ch., sec. 3(a)(ii)c.(2).

[224] Masterman Report, *supra*, note 207, para. 85, at 28. The Committee was impressed by several factors. First, civil servants were considered to be in a position to make a

The grant of permission to engage in local political activity was to be a matter within the department head's discretion, but in the exercise of that discretionary authority, it was recommended that account be taken of such matters as: (1) the possibility of embarrassment being caused to the department, as a result of the employee's rank and duties; (2) whether the employee worked in the locality in which he sought election; and (3) the extent of the demands to be made on the employee's time.[226]

d. Result of Implementation

The Masterman Committee noted that, by implementing its proposals, 666,000 civil servants (58.63 percent of a total civil service of 1,136,000 employees) would be within the politically free group, while the remaining 470,000 (41.37 percent) would remain politically restricted.[227]

(iii) Government White Paper

a. General

Following publication of the Masterman Report in 1949, the government announced its acceptance of the Committee's recommendations. The decision to implement those recommendations, however, met with opposition from the Staff Side of the Civil Service National Whitley Council.[228] In response, the

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valuable contribution to the work of municipal councils, without any consequent loss of public confidence in the impartiality of the Service. Secondly, the Committee was of the opinion that the participation of civil servants, by virtue of their experience and qualifications, assisted in maintaining the standard of local government. Thirdly, the official work of those who had participated in local government had benefited from their experience acquired in local administration. Finally, the Committee saw an inherent benefit to be gained from permitting the greatest possible freedom.

[225] *Ibid.*, para. 87, at 29, and para. 10, at 32.

[226] *Ibid.*, para. 88, at 29.

[227] *Ibid.*, para. 13, at 32.

[228] The National Whitley Council is a forum for consultation and discussion of matters relating to the conditions of service for junior non-industrial grade civil servants. It consists of senior officials (the Official Side) and representatives of the trade union (the Staff Side).

government announced that it would give immediate effect to the Masterman Committee recommendation concerning those employees below the Masterman line, but that it would give further consideration to the recommendations concerning those above the line. For the latter purpose, a Joint Committee of the National Whitley Council was appointed, the Report of which was issued in April, 1952.[229] The government announced its conclusions in a White Paper, the following year.[230]

b. The Whitley Committee Report

(1) The Intermediate Category: Creation and Composition

The Joint Committee of the National Whitley Council proposed that the civil service be divided, not into two groups, as originally recommended by the Masterman Committee, but rather into three. The politically free group, in the form recommended by the Masterman Committee, would remain unaltered. However, after concluding that certain grades in the restricted category included employees who could be permitted to engage in political activity without thereby jeopardizing the integrity of the civil service, the Committee recommended that the politically restricted group be further divided into a politically restricted group and an intermediate group. Employees in the intermediate category, it was proposed, would be neither completely free, nor completely restricted; rather, they would be eligible to seek permission to engage in all national political activities, with the exception of Parliamentary candidature.[231]

Both the Official Side and the Staff Side of the Whitley Committee agreed that the intermediate category should include the following grades: (1) typing, clerical, and parallel grades; (2) grades not in the executive class, but of roughly the same status, for example, draughtsmen, experimental officers and certain technical grades; and (3) Post Office manipulative supervisory officers. They were unable to agree, however, on whether the junior executive officer and analogous grades should be included within the intermediate category, or whether they should remain in the restricted category.[232]

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[229] United Kingdom, Civil Service National Whitley Council, *Report of a Joint Committee set up to consider certain aspects of the general question of the political activities of civil servants* (April 23, 1952) (hereinafter referred to as "Whitley Committee Report"), published as an Appendix to *Political Activities of Civil Servants* (Cmd. 8783, 1953) (hereinafter referred to as "White Paper"), at 7. Page references for the Whitley Committee Report refer to the White Paper.

[230] White Paper, *ibid*.

[231] Whitley Committee Report, *supra*, note 229, paras. 9-11, at 9.

[232] *Ibid*., paras. 18 and 24, at 10 and 11. The Staff Side argued that junior executive officers should be included within the intermediate class, for the following reasons: (1) at the junior executive officer level, the public interest in allowing political rights is not outweighed by the public interest in maintaining impartiality; (2) it is too restrictive to view junior executive officers as being similar to members of higher administrative grades, or to consider the integrity of the civil service to be equally at risk through the activity of members of both groups; and (3) a significant number of junior executive

(2) *National Political Activity*

While those in the intermediate category would be eligible to seek permission to engage in political activity, the Whitley Committee did not propose that employees who have obtained such permission should be treated, for all purposes, as if they were in the politically free category. Employees in the intermediate category with permission to engage in political activity would be treated differently in two respects: (1) they would not be eligible for permission to run as a candidate for Parliament; and (2) they would receive permission to engage in political activities subject to a code of discretion that would limit the employee's expression of views on government policy and national political issues.[233]

(3) *The Grant of Permission*

The Whitley Committee also considered the nature of the permission itself. Each department was to divide its intermediate class employees into: (1) those covered by *en bloc* permission to engage in national political activity; and (2) those who must seek permission on an individual basis. The primary criterion to be applied in determining whether permission was to be granted was the employee's degree of contact with the public.[234] It is to be noted that no right of appeal was provided in the event that a request for permission was denied.

(4) *Local Political Activity*

Intermediate class employees would also be eligible for permission to participate in local political activity. Those members of the intermediate category who were covered by *en bloc* permission to engage in national political activity would ordinarily be allowed, subject to a code of discretion, to engage in local political activity. Upon their election to a local authority they would simply be required to notify their department. Those members of the intermediate category who were not covered by *en bloc* permission to engage in national political activity would be eligible to seek individual permission to engage in local political activity, and such permission could be granted even though permission to engage in national political activity had been withheld.[235]

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officers could engage in political activity without any real risk to the public confidence in the civil service, and they ought not to be prevented from doing so on a theory that at the junior executive level, the arguments against the grade, as a class, outweigh the arguments in favour of the individual. The Official Side argued that junior executive officers should not be included within the intermediate class, but rather, should remain in the restricted class, for the following reasons: (1) at the junior executive level the public ought to be assured of the employee's political neutrality; (2) members in all grades of the executive class are often engaged in working out the details of government policy; and (3) the nature of an employee's responsibilities are fundamentally different above the grade of clerical officer. *Ibid.*, Annex 4, paras. 2-4, at 15-16.

[233] *Ibid.*, paras. 11 and 12, at 9.

[234] *Ibid.*, paras. 13 and 14, at 9-10.

[235] *Ibid.*, para. 15, at 10. The Whitley Committee recommended that members of the politically restricted group also should be free to seek permission to engage in political activity at the local level, subject to a code of discretion: *ibid.*, para. 16, at 10.

(5) Canvassing

With the exception of canvassing, both Sides of the Whitley Committee were in agreement that permission ought to be required for members in the intermediate category to engage in those national political activities, other than candidature, that were subject to restriction in the Masterman Report.[236] The Official Side argued that canvassing ought to be restricted because it involved a sufficient public manifestation of partisan views that the employee might be associated prominently with a political party; further, knowledge of canvassing on the part of a civil servant might give rise to public concern.[237] The Staff Side argued, on the other hand, that canvassing need not be a prohibited political activity for any category of civil servant because, by its very nature, it did not involve a sufficient public manifestation of partisan commitment. The Staff Side suggested that, while individuals might identify themselves, to some extent, with a political party by canvassing, they did not do so publicly. In their view, the public element of canvassing was minimal; in reality canvassing was simply a series of private interactions.[238]

c. *The Government's Conclusions*

The government considered the Whitley Committee Report and concluded that its proposals for the creation and operation of the intermediate class ought to be implemented. The establishment of the intermediate category was seen to represent a fair and reasonable balance between the two fundamental, although conflicting, principles articulated by the Masterman Committee.[239]

The government also decided the two issues on which the Whitley Committee had been unable to reach agreement. With respect to the composition of the intermediate category, the government concluded that the junior executive officer and analogous grades should remain in the politically restricted group.[240] With respect to canvassing, the government concluded that this activity ought to remain within the definition of political activities subject to restriction. Accordingly, members of the intermediate category would be entitled to canvass only upon receiving permission to do so, and members of the politically restricted category would be prohibited from canvassing.[241]

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[236] *Ibid.*, Annex 3, para. 1, at 13. The national political activities, other than candidature, subject to restriction in the Masterman Report are reproduced *supra*, this ch., sec. 3(a)(ii)c.(2).

[237] Whitley Committee Report, *supra*, note 229, Annex 3, para. 2, at 13.

[238] *Ibid.*, Annex 3, para. 3, at 13-14.

[239] White Paper, *supra*, note 229, para. 10, at 5. The principles referred to by the Masterman Committee are noted *supra*, this ch., sec. 3(a)(ii)a.

[240] White Paper, *supra*, note 229, para. 11, at 5.

[241] *Ibid.*, para. 12, at 5.

The virtues of this scheme, as perceived by the government, were described as follows:[242]

> [It] imposes restrictions on civil servants only where they are necessary if the confidence of the public in the political impartiality of the Civil Service is not to be impaired. To preserve this confidence political reserve must be maintained not only by those civil servants who work in the spheres where policy is determined: but also by those who work in local offices and deal directly with the individual citizen in relation to his personal circumstances. It is the latter who are 'the Civil Service' to the individual citizen.
>
> Under the arrangements now to be introduced the Government have no doubt that freedom will be given wherever it can be given without detriment to the interests of the State, and they are confident that these arrangements will commend themselves to public opinion generally as a fair and reasonable solution of a difficult question.

d. Result of Implementation

By implementing these proposals, the proportion of the civil service that would be free to engage in political activities would be significantly increased over that which would be politically free pursuant to the Masterman Committee recommendations. Approximately 62 percent of the civil service would be in the politically free group, 22 percent would be in the intermediate group (and thus eligible for permission, subject to a code of discretion, to engage in all political activities, except for Parliamentary candidature), and approximately 16 percent would be in the politically restricted group (and thus prohibited from engaging in national political activity, but free to seek permission to engage in local political activity).[243]

(iv) The Armitage Report

a. General

The restrictions on political activity by civil servants again became a matter of public inquiry in Britain, as a result of a series of attempts by the Staff Side of the Civil Service National Whitley Council to initiate the process of reform. On May 19, 1976 a committee was established, under the chairmanship of Sir Arthur Armitage, "to review the rules governing the active participation by civil servants in national and local political activities; and to make recommendations".[244]

The Armitage Committee considered the changed circumstances since the Masterman Report, including the demographic and structural changes in the civil service itself, as well as changes in the normative values of society generally, reflected in the civil service. While these factors may have justified some liberalization of the existing regime, the Committee noted other factors that would militate against such a conclusion. In this regard the Committee suggested that the greater impact of the civil service on a wider range of organizations increased the importance of the public confidence in the integrity of the service.[245] After considering the notion of political impartiality, and its implications for the individual civil servant, the Committee concluded that it would "avoid proposing changes to the rules which might precipitate a fundamental shift in the attitude either of the Civil Service itself or of the public towards it".[246]

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[242] *Ibid.*, para. 15, at 6.

[243] *Ibid.*, para. 13, at 5-6.

[244] *Supra*, note 1, para. 1, at 1.

As will be discussed below, the Armitage Committee declined to make any recommendations that would alter the specifically enumerated political activities subject to restriction; it did, however, make recommendations that would alter significantly the method of determining which civil servants would be subject to those restrictions.

b. Political Activity

(1) Parliamentary Candidature and Service

The Committee concluded that the existing prohibition against Parliamentary candidature, applicable to employees of the intermediate and restricted categories, ought to be continued. This conclusion was reached notwithstanding the National Staff Side's argument that Parliamentary candidature should be treated like any other form of national political activity. With the exception of employees in the politically free category, the Committee felt that political impartiality would be compromised by the candidature for Parliament of a civil servant. For similar reasons, the Committee also concluded that the rules ought not to be expanded to permit the reinstatement of a civil servant, in the intermediate or restricted categories, who has resigned in order to stand for election to Parliament.[247]

(2) National Political Activities Other Than Candidature

The Armitage Committee did not recommend that any change be made in those political activities other than Parliamentary candidature that were subject to restriction. Thus, the definition of restricted political activity, as originally formulated by the Masterman Committee, was essentially continued.

Holding office in a party political organization, or expressing publicly one's views on matters of partisan political concern, would, in the view of the Committee, associate an individual prominently with a particular political party, and accordingly, it was felt, such restrictions must continue. The Committee confirmed, however, that less overt political activity, for example, membership in a political party, was unobjectionable.[248]

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[245] *Ibid.*, para. 40, at 13-14.

[246] *Ibid.*, para. 78, at 24.

[247] *Ibid.*, para. 84, at 26. Two members dissented from the Committee's recommendations in this context. In the minority view, certain employees in the intermediate category might be permitted to engage in political activity without thereby causing detriment to the civil service. The minority was of the view that, subject to an application of the proposed criteria for permission, there ought not to be any distinction between candidature for Parliament and other national political activity for such employees. *Ibid.*, asterisk, at 26.

Canvassing was the only restricted political activity, other than Parliamentary candidature, in respect of which there was any real contention. After noting the arguments both for and against including canvassing within the definition of restricted political activity, the Committee concluded that the restriction ought to continue. Canvassing was not viewed as simply a form of objective research, but rather as an activity that involves a public manifestation of partisan commitment.[249]

(3) Critical Comment of a Nonpartisan Nature

Due to the proliferation of controversial "public interest" issues, and a corresponding increase in the number of public interest pressure groups, particularly since the end of the Second World War, the Committee felt itself obliged to reconsider the rules concerning the public expression of views on nonpartisan political matters. The Committee noted that, while many of these public interest matters were nonpartisan, they might nevertheless be political in nature. Accordingly, the Armitage Committee recommended that those civil servants who were required to maintain a reserve in partisan political matters ought to maintain a comparable reserve in respect of these nonpartisan political matters.[250]

(4) Local Political Activity

The Armitage Committee noted that, as a result of the increasing importance of party political activity at the local level, and the increasing degree of interaction between the two levels of government, there was some question concerning the continued validity of the distinction between national and local political activity. However, the Committee concluded that it was possible for a civil servant to engage in local political activity without becoming involved in matters of national political controversy. The satisfactory operation of the rules, which recognized the distinction between national and local politics, was seen as an indication that the distinction ought to be continued. Removal of the distinction would result in a prohibition against local political activity by members of the restricted group. The Committee was loath to make such a recommendation in the absence of evidence that participation in local political activities by members of the restricted category had had an adverse effect upon the reputation of the civil service.[251]

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[248] *Ibid.*, para. 80, at 25.

[249] *Ibid.*, paras. 93-96, at 28-29. Two dissenting views were recorded. In the view of the minority, canvassing was said to be an anonymous act, the restriction of which would be unreasonable. *Ibid.*, asterisk, at 29.

[250] *Ibid.*, paras. 97-99, at 29-30.

[251] *Ibid.*, paras. 87-92, at 27-28.

(5) Political Activity by Civil Service Trade Unions

The Committee was advised by the Civil Service Department that, in its application of the rules regarding political activity, the Department had been somewhat more tolerant in those cases in which the employee acted in a representative capacity as a trade union official, engaged in legitimate union activity. It was acknowledged that in the course of legitimate union activity, particularly during a trade dispute, critical comments may be made that unavoidably refer to government policy. The Committee endorsed the Civil Service Department's practice, reasoning that the public is quite capable of distinguishing between criticism arising in the course of legitimate trade union activity, and comment critical of the government arising from partisan political commitment.[252]

c. Categorization of the Civil Service

(1) General

The Armitage Committee concluded that "[t]he nature of the work involved in any particular post or group of posts seems ... at once a more relevant and less rigid criterion of whether political activity by the holder of the post is or is not permissible."[253] Thus, if civil servants were to be prohibited from engaging in political activity, it was the view of the Committee that they should be restricted, not by reason of the grade of their civil service appointment, but rather by reason of the nature of the duties they performed. In order to expand the application of this approach, the Committee recommended that a number of job grades be transferred from the restricted category to the intermediate category, in which the employees are granted or refused permission to engage in political activity primarily on this basis. In this way, for those individuals transferred into the intermediate class, arbitrary restrictions based on job grade would be replaced by an assessment of the duties performed by the individual civil servant.[254]

The Committee concluded that the composition of the politically free category should remain unaltered.[255] However, it recommended that the restricted category should be reduced to include only civil servants at the level of Principal and above. Senior and Higher Executive Officers, and Executive Officers would be moved from the restricted category to the intermediate category and, accordingly, would no longer be prohibited from engaging in political activity solely by reason of job grade.[256] They would be prohibited from engaging in political activity only in the event that the nature of their duties rendered political activity undesirable. The rationale for retaining the restricted category, notwithstanding the Committee's adoption of a functional approach, was stated as follows:[257]

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[252] *Ibid.*, paras. 100-02, at 30-31.

[253] *Ibid.*, para. 145, at 43.

[254] *Ibid.*, para. 146, at 43.

[255] *Ibid.*, para. 154, at 45. Two dissenting views were noted. The minority would have kept the composition of the politically free group under review. *Ibid.*, double asterisk, at 45.

[256] *Ibid.*, paras. 155-57, at 45-46.

> [T]here are certain types of job in the Civil Service which must inevitably impose an automatic restriction on the freedom of those who perform them to engage in national political activities. By the nature of the Civil Service all those at the level of Principal and above are likely at most times to be involved in work of this kind and we think that it is right therefore that the restricted category should be retained for such staff.

The Committee recognized that the rules applicable to career civil servants are not applicable to special advisers. Such advisers are engaged to provide political advice to Ministers, and are appointed only for a limited time. Accordingly, no adverse effect upon the public confidence in the impartiality of the civil service could result from such an adviser engaging in political activity. The Committee recommended, however, that specific guidelines respecting the political activity of special advisers be promulgated by the Prime Minister.[258]

(2) Criteria for Permission

The Armitage Committee was quite specific in its recommendation concerning the establishment of criteria for the grant of permission to employees in the intermediate category to engage in political activity, stating that "[w]e feel it imperative that there should be standard criteria on which the judgment of departments should be based. These criteria should be simple, unambiguous and public and we have paid particular attention to this requirement."[259] The articulation of objective criteria was one of the Armitage Committee's primary contributions. The Committee reviewed the range of work performed by civil servants, cognizant of the fact that not only must the civil service be impartial, but it must be perceived to be impartial as well. Accordingly, the Committee was particularly concerned with those functions in which the civil servant has frequent contact with individuals outside the service. Having completed its review, the Armitage Committee identified a number of sensitive areas that, in its opinion, involved particular risk to the impartiality, both real and perceived, of the civil service. On that basis the Committee recommended that permission to engage in political activity normally should not be granted to the following:[260]

> (i) staff dealing directly with Ministers either in advising them or in submitting policy recommendations or in executing Ministerial decisions;
>
> (ii) staff, a substantial amount of whose work involves them in both: —
>
> (a) intimate knowledge and direct contact with members of the public in regard to their personal affairs; *and*

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[257] *Ibid.*, para. 155, at 46.

[258] *Ibid.*, paras. 133-36, at 39-40.

[259] *Ibid.*, para. 147, at 43.

[260] *Ibid.*, para. 147, at 43-44 (emphasis in original).

(b) making, or contributing to making, decisions affecting the personal lives of members of the public;

(iii) staff fulfilling a representational role in which they become in effect a spokesman for the Government or for the department whether in dealings with commercial undertakings, pressure groups, local government, public authorities or any other bodies;

(iv) staff representing HM Government overseas;

(v) staff working in sensitive areas, for example a Minister's Private Office or security.

The rationale for restricting the first group, that is, civil servants dealing directly with Ministers, seems uncontentious. The career civil service must be capable of serving governments of quite different political complexions, and it must be capable of doing so in such a fashion that the current Minister retains confidence in the impartiality of those who provide advice or carry out Ministerial instructions. Moreover, political activity by civil servants engaged in the formulation and implementation of policy might have an adverse effect upon the public confidence in the impartiality of the civil service.[261]

The second restriction addressed quite a different concern: the civil servant, employed in a local government office, who deals with members of the public on matters that affect them directly in their personal capacities. A civil servant interacting with the public directly might have a certain degree of discretionary authority, the exercise of which could very well have a significant impact upon the personal life of the citizen. The Committee was concerned that, if such an employee were known to have a particular political commitment, it might create a reasonable apprehension, on the part of the public, of bias in the exercise of the employee's decision-making authority. Even if the civil servant possessed no discretionary authority, the Committee was concerned that he might still be perceived, by members of the public, as having such authority; further, even without such authority he might nevertheless influence the decision-making process. Finally, civil servants employed in local government offices were often privy to sensitive personal information relating to their government clients. Political activity by such employees, it was feared, might create the potential for embarrassment.[262]

The third category of employees who, by virtue of the nature of their duties, the Committee suggested ought not to receive permission to engage in political activity, was composed of those civil servants who represent the government. In such cases the employee was said to have an obligation not to conduct himself or herself in such a way as to create a reasonable apprehension that he or she supports a particular political party.[263]

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[261] *Ibid.*, paras. 105-11, at 32-34.

[262] *Ibid.*, paras. 112-18, at 34-35.

[263] *Ibid.*, paras. 119-22, at 35-37.

Staff representing the government overseas, the fourth category, were seen as a clear source of potential embarrassment to the government. Such would occur, for example, if it became known that a member of the Diplomatic Service actively supported a political party that opposed the very policy the employee was called upon to represent.[264]

The final category, staff working in sensitive areas, was included by the Armitage Committee essentially without the articulation of any specific rationale.

(3) The Grant of Permission

As was the case in the White Paper recommendations, employees in the intermediate category who had obtained permission to engage in political activity would not be treated for all purposes as if they were in the politically free category. In addition to remaining ineligible for permission to stand for election to Parliament, they would only receive permission to engage in other political activities, whether national or local, subject to a code of discretion prescribing the degree of moderation and discretion to be observed by the employee.[265]

The Committee endorsed the notion that block permission ought to be granted by the respective government departments, where the functions performed by the relevant employees were not within the proposed criteria. Such a procedure was viewed as particularly appropriate in the case of relatively junior grade staff and, when available, would be "simple, economical, easily understood and readily accepted ...".[266]

A second significant contribution made by the Armitage Committee was its recommendation that an applicant should have the right to appeal, in the event that a request for permission was refused. The nature of the appeal right recommended by the Committee, however, was limited in two respects. First, the Committee refused to recommend that the adjudicative body be external to the civil service itself. It expressed the following concerns about granting jurisdiction over the appeal process to an outside body: (1) the publicity associated with such an appeal might exacerbate the very risk it was designed to allay, that is, loss of public confidence in the impartiality of the service; and (2) an external tribunal, lacking the detailed knowledge available to an internal body, might permit conduct thought improper by the Civil Service Department or a Minister, and the Minister might thereby be caused some degree of embarrassment. Secondly, the appeal process recommended by the Committee would be subject to the ultimate control of the Minister. The Committee concluded that, following the decision of the adjudicative tribunal, the Minister involved should be entitled finally to resolve the matter.[267]

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[264] *Ibid.*, paras. 123-26, at 37.

[265] *Ibid.*, para. 148, at 44.

[266] *Ibid.*, para. 149, at 44.

[267] *Ibid.*, para. 152, at 45.

d. *Result of Implementation*

By implementing the recommendations of the Armitage Committee, 3.1 percent of the civil service would be in the restricted category (and thus prohibited from engaging in national political activity, but free to seek permission, based upon the nature of their work, to engage in local political activity), 67.9 percent would be in the intermediate category (and thus, based upon objective criteria regarding job function, eligible to seek permission to engage in all political activities except for Parliamentary candidature), and 29.0 percent would be in the politically free category.[268]

(v) The Current Position

a. *General*

The majority recommendations of the Armitage Report, adopted by the government in 1984, have been instituted by way of amendment to the *Civil Service Pay and Conditions of Service Code*.[269]

b. *Political Activity*

(1) Parliamentary Candidature and Service

All civil servants are disqualified for membership in the House of Commons[270] and, accordingly, even members of the politically free group must resign their position if elected. Pursuant to the Servants of the Crown (Parliamentary Candidature) Order 1960, civil servants in the intermediate and restricted categories must resign before their election, upon their formal adoption as a parliamentary candidate or prospective candidate. The Servants of the Crown (Parliamentary Candidature) Order 1960, provides that civil servants, with the exception of those in the politically free group, may not issue an address to electors, or in any other manner publicly announce themselves or allow themselves to be publicly announced, as candidates or prospective candidates for election to Parliament.[271]

While all civil servants who are elected to Parliament thus must resign from the civil service, those in the politically free category are entitled to reinstatement, provided that the following three conditions are met: (1) they are absent in Parliament for not longer than five years; (2) at the time of their election they had at least ten years' service; and (3) they apply for reinstatement within three months after ceasing to be a Member of Parliament.[272] A civil servant in the politically free category who is an unsuccessful candidate for

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[268] *Ibid.*, para. 157, at 46.

[269] *Civil Service Pay and Conditions of Service Code*, Civil Service Order in Council 1969, art. 5, as am. by Code Memorandum CM/662, Sept. 28, 1984 (hereinafter referred to as "Code").

[270] *House of Commons Disqualification Act 1975*, c. 24 (U.K.), s. 1(1)(b).

[271] Servants of the Crown (Parliamentary Candidature) Order 1960, arts. 1(1) and 2.

[272] Code, *supra*, note 269, para. 9955.

Parliament is entitled to reinstatement, provided an application therefor is made within a week of declaration day. The period of leave, however, is not counted for annual increment or superannuation purposes; nor is salary paid during the leave.[273]

Civil servants in the intermediate or politically restricted groups will not normally be reinstated in the civil service after resignation for parliamentary candidature.[274]

(2) Political Activities Other Than Candidature

Other than candidature for Parliament, the political activities subject to restriction, as originally defined in the Masterman Report, and approved in the Armitage Report, continue to be subject to restriction. At the national level, therefore, the following political activities are subject to restriction:[275]

a. public announcement as a candidate or prospective candidate for Parliament or the European Assembly

b. holding, in party political organisations, offices which impinge wholly or mainly on party politics in the field of Parliament or the European Assembly

c. speaking in public on matters of national political controversy

d. expressing views on such matters in letters to the Press, or in books, articles or leaflets

e. canvassing on behalf of a candidate for Parliament or the European Assembly, or on behalf of a political party.

Essentially, the same activities are restricted at the local level. The Code defines local political activities subject to restriction as follows:[276]

a. candidature for, or co-option to, local authorities

b. holding, in party political organisations, offices impinging wholly or mainly on party politics in the local field

c. speaking in public on matters of local political controversy

d. expressing views on such matters in letters to the Press, or in books, articles or leaflets

e. canvassing on behalf of candidates for election to local authorities or a local political organisation.

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[273] *Ibid.*, para. 9956.

[274] *Ibid.*

[275] *Ibid.*, para. 9924.

[276] *Ibid.*, para. 9925.

(3) Political Reserve and the Code of Discretion

Those civil servants in the intermediate and politically restricted groups who have not obtained permission to engage in any of the national or local political activities subject to restriction are required to maintain a reserve in political matters, and are thus required to avoid any public expression of views that might associate them prominently with any political party.[277]

Even if a civil servant has received permission to engage in restricted political activity, whether at the local level (in the case of an employee in either the restricted category or the intermediate category) or at the national level (in the case of an employee in the intermediate category), the civil servant is nevertheless required to avoid becoming so politically partisan that he is unable, or appears to be unable, to discharge effectively his duties of office. Accordingly, permission to engage in restricted political activity is subject to the following code of discretion:[278]

> a. individuals in the intermediate and politically restricted groups undertaking political activities should bear in mind that they are servants of the Crown, working under the direction of Ministers forming the government of the day. While they are not debarred from advocating or criticising the policy of any political party, comment should be expressed with moderation, particularly in relation to matters for which their own Ministers are responsible, and indeed all comment avoided if the departmental issue concerned is controversial. Personal attacks should be avoided
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> b. every care should be taken to avoid any embarrassment to Ministers or to their departments which could result, inadvertently or not, from the actions of a person known to be a civil servant who brings himself prominently to public notice in party political controversy
>
> c. permission to participate only in local political activities is granted subject to care being taken by the officer concerned not to involve himself in matters of political controversy which are of national rather than local significance.

(4) Political Activity by Civil Service Trade Unions

It is recognized in the current rules that an elected trade union official, in the course of conducting legitimate trade union activity, may be required to comment upon government policy. To the extent an employee does so, however, he or she is required to make it clear that his or her views are being expressed in a representative capacity as a trade union official, rather than in his or her capacity as a civil servant. Further, such views must be expressed in a reasonable manner.[279]

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[277] *Ibid.*, para. 9928.

[278] *Ibid.*, para. 9934.

[279] *Ibid.*, para. 9937.

c. *Categorization of the Civil Service*

(1) General

Pursuant to the recommendations of the Armitage Committee, civil servants are currently divided into three categories, as follows: (1) the politically free group (including all industrial staff and non-office grades, and any other grades determined by departments in consultation with the Cabinet Office); (2) the politically restricted group (including Principal and equivalent grades and above, as well as Administration Trainees and Higher Executive Officers); and (3) the intermediate group (including all civil servants not in either of the other two groups).[280]

Employees in the politically free group are completely free to engage in all political activity, at both the national and local level. Like all other civil servants, however, they are prohibited from engaging in any form of political activity while on duty, while in uniform, or while on official premises, and they are required to comply with the rules regarding the use of official information or experience.[281]

Employees in the politically restricted group are prohibited from engaging in restricted political activities at the national level, but they may seek permission to engage in restricted political activities at the local level. The application for permission is determined by the employee's department, upon a consideration of the same criteria applied in the event of an application by an employee in the intermediate group. An employee in the restricted group who has obtained permission to engage in local political activity must notify his department upon his election to a local authority. If permission is withheld, the employee is to be notified of the reasons for the decision.[282]

Civil servants in the intermediate group are prohibited from engaging in restricted political activity, except with permission. They are eligible to seek permission to engage in any or all restricted political activities, at both the national and local level, with the exception of parliamentary candidature.[283]

(2) Criteria for Permission

As noted above, the Armitage Committee reviewed the range of work performed by the civil service and identified a number of sensitive areas that, in its view, involved particular risk to the impartiality of the service. Ordinarily, permission is to be denied, on that basis, to the following groups of employees:[284]

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[280] *Ibid.*, para. 9926.

[281] *Ibid.*, paras. 9926 and 9927.

[282] *Ibid.*, para. 9933.

[283] *Ibid.*, para. 9926.

[284] *Ibid.*, para. 9929. The four groups of employees normally disentitled from receiving permission to engage in political activity were derived, with some reworking, from the

a. staff closely engaged in policy assistance to Ministers (or to non-departmental Crown bodies) eg in tendering advice or executing immediate Ministerial directives, or working in sensitive areas eg the private offices of Ministers or senior officials, or areas which are acutely politically sensitive or subject to considerations of national security

b. staff who regularly speak for the Government or the Department in dealings with commercial undertakings, pressure groups, local government, public authorities or any other bodies, and who may appear to these organisations to have influence in the application of government policy affecting them

c. staff who represent HM Government in dealings with overseas Governments

d. staff whose official duties involve a significant amount of face-to-face contact with individual members of the public and who make, or may seem to the public to be involved in making decisions affecting them, and whose political activities are likely to be (or become) known to those members of the public (eg those whose work involves them or may seem to the public to involve them in both intimate knowledge and direct contact with members of the public in regard to thei. personal affairs, and decisions affecting their personal lives).

Ordinarily, an employee who is granted permission to engage in national political activity will also receive permission to engage in local political activity. However, the nature of the specific duties performed by the applicant may require that permission be granted solely in respect of either local political activity or national political activity. Departments in close official contact with local authorities may apply special rules upon an application. For example, they may grant such permission exclusively for an area outside the area in which the civil servant works.[285]

(3) The Grant of Permission

In accordance with the recommendations made by the Armitage Committee, the grant or refusal of permission to engage in political activity is based upon the nature of the particular individual's official duties. Initially, the application is determined by the employee's department, which is to grant permission, to the maximum possible extent, while still ensuring that Ministers and the public have confidence that the civil servant's personal political views will not affect the discharge of his or her official duties.[286]

For those positions that fall outside the sensitive areas noted above, and to the extent possible, departments are to grant *en bloc* standing permission, by identifying those intermediate category positions within the department for which individual permission is not required. Such standing permission may be

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five groups originally identified in the Armitage Report, *supra*, note 1, reproduced in text following note 260, *supra*.

[285] Code, *supra*, note 269, para. 9930.

[286] *Ibid.*, paras. 9929 and 9923. As noted above, even if permission is granted, it is granted subject to observance of the code of discretion, reproduced in text following note 278, *supra*.

granted in respect of either national or local political activities, or both. Employees who have received standing permission are required, however, to give the department prior notice of intent to engage in political activity.[287]

A civil servant who has been refused permission to engage in political activity has a right to appeal to the Civil Service Appeal Board. The question for determination by the Appeal Board, in any particular case, is whether it would be inadvisable, upon an application of the appropriate criteria, to permit the individual to engage in the political activity, permission for which was initially refused. In the event that the Board concludes that it would not be inadvisable, it may recommend to the head of the relevant department that the activity should be allowed, with or without conditions. If the head disagrees with the decision of the Appeal Board, the matter must be submitted to the Minister for final resolution.[288]

d. Result of Implementation

According to the most recent statistics available,[289] as of July, 1984, 22,000 civil servants were in the restricted category (3.53 percent of a total civil service of 624,000 employees), 440,000 civil servants were in the intermediate category (70.51 percent), and 162,000 civil servants were in the politically free category (25.96 percent).

(b) CONFIDENTIALITY

In the United Kingdom, public servants are subject to restrictions on disclosure imposed by the *Official Secrets Act 1911*[290] and various statutory secrecy provisions. We turn now to a discussion of these restrictions.

(i) The *Official Secrets Act 1911*

In earlier portions of this Report,[291] we considered briefly section 4(1) of the Canadian *Official Secrets Act*,[292] which, *inter alia*, imposes criminal liability for wrongful communication of information. Section 4 of the Canadian Act is virtually identical to section 2 of the United Kingdom legislation, which provides, in part, as follows:

> 2.-(1) If any person having in his possession or control any secret official code word, or pass word, or any sketch, plan, model, article, note, document, or

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[287] Code, *supra*, note 269, para. 9931.

[288] *Ibid.*, paras. 9942 and 9945.

[289] Commission interview with Geoffrey Court, Head of Personnel Management 1 Division, Cabinet Office (MPO), May 13, 1986.

[290] *Supra*, note 220, s. 2(1). Pursuant to the *Official Secrets Act 1939*, 2 & 3 Geo. 6, c. 121, s. 2(1), the *Official Secrets Act 1911*, the *Official Secrets Act 1920*, 10 & 11 Geo. 5, c. 75, and the *Official Secrets Act 1939*, may be cited together as the *Official Secrets Act 1911 to 1939*, and are to be construed together.

[291] *Supra*, ch. 3, sec. 3(b)(ii)b., and this ch., sec. 2(b)(i)b.

[292] *Supra*, note 162.

> information ... which has been entrusted in confidence to him by any person holding office under His Majesty or which he has obtained or to which he has had access owing to his position as a person who holds or has held office under His Majesty...
>
> > (a) communicates the code word, pass word, sketch, plan, model, article, note, document, or information to any person, other than a person to whom he is authorised to communicate it, or a person to whom it is in the interest of the State his duty to communicate it ...
>
> that person shall be guilty of a misdemeanor.

Section 2 has been given a broad interpretation. In this respect, the Departmental Committee (Franks Committee) that was appointed in 1971 to study this provision commented as follows:[293]

> The main offence which section 2 creates is the unauthorised communication of official information (including documents) by a Crown servant. The leading characteristic of this offence is its catch-all quality. It catches all official documents and information. It makes no distinctions of kind, and no distinctions of degree. All information which a Crown servant learns in the course of his duty is 'official' for the purposes of section 2, whatever its nature, whatever its importance, whatever its original source. A blanket is thrown over everything; nothing escapes. The section catches all Crown servants as well as all official information. Again, it makes no distinctions according to the nature or importance of a Crown servant's duties. All are covered. Every Minister of the Crown, every civil servant, every member of the Armed Forces, every police officer, performs his duties subject to section 2.

It will be recalled that, when we discussed section 4 of the Canadian Act, we observed that there was uncertainty whether the provision applies to all government information or only to "secret official" information. In England, the former interpretation clearly prevails, so that improper communication of any government information would involve the risk of prosecution. Moreover, the courts have indicated that a person who makes a disclosure to an unauthorized person violates section 2, regardless of motive and regardless of whether prejudice to the State ensues.[294]

The effect of section 2 is tempered in practice by "a doctrine of implied authorisation", which has been described as follows:[295]

> Nevertheless governments regularly reveal a great deal of official information. These disclosures do not contravene section 2. A Crown servant who discloses official information commits an offence under the section only if the information is disclosed to someone 'other than a person to whom he is authorised

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[293] United Kingdom, Departmental Committee on Section 2 of the Official Secrets Act 1911, *Report of the Committee* (Cmnd. 5104, 1972) (hereinafter referred to as "Franks Report"), Vol. 1, para. 17, at 14.

[294] See Cripps, "Disclosure in the Public Interest: The Predicament of the Public Sector Employee", [1983] Pub. L. 600, at 615-17.

[295] Franks Report, *supra*, note 293, para. 18, at 14-15.

> to communicate it, or a person to whom it is in the interest of the State his duty to communicate it.' The Act does not explain the meaning of the quoted words. We found that they were commonly supposed, by persons outside the Government, to imply a fairly formal process of express authorisation. Actual practice within the Government rests heavily on a doctrine of implied authorisation, flowing from the nature of each Crown servant's job. In the words of the Home Office, 'the communication of official information is proper if such communication can be fairly regarded as part of the job of the officer concerned'. Ministers are, in effect, self-authorising. They decide for themselves what to reveal. Senior civil servants exercise a considerable degree of personal judgment in deciding what disclosures of official information they may properly make, and to whom. More junior civil servants, and those whose duties do not involve contact with members of the public, may have a very limited discretion, or none at all.

On entering and leaving the civil service, a civil servant signs an *Official Secrets Act* declaration. In the declaration, the civil servant states that his or her attention has been drawn to the provisions of the *Official Secrets Act 1911 to 1939* that are printed on the reverse side of the document; section 2 is one of them. The declaration states also that the civil servant understands that, among other matters information relating to government work must not be communicated to any person, and drawings, notebooks, and other documents relating to this work must not be retained or removed. While this declaration has no legal force, it serves an informational, and presumably a cautionary, purpose.[296]

Other administrative mechanisms reinforce the obligation of confidentiality imposed by the *Official Secrets Act 1911*. The *Civil Service Pay and Conditions of Service Code*,[297] enunciates general principles of conduct for civil servants; the principle governing disclosure of official information reiterates the substance of the offence established under section 2 of the Act.[298] Underlying the Code and the *Official Secrets Act 1911* is the formal disciplinary system of the civil service, which presents the threat of various sanctions, ranging from reprimand to dismissal, in the event of an unauthorized disclosure. Further caution is indicated by a system of security classification for documents.[299]

Although section 2(1) of the British Act and section 4(1) of its Canadian counterpart are virtually identical, there have been many more prosecutions under the British provision for unauthorized disclosure. In the period from 1946 to 1979, over thirty-five persons were prosecuted in England for breach of this section.[300] By contrast, in 1979, the McDonald Commission noted that, in Canada, there had been only two prosecutions under section 4 since 1946.[301]

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[296] See, generally, *ibid.*, note 293, paras. 34-36, at 19-20.

[297] *Supra*, note 269.

[298] *Ibid.*, para. 9904.

[299] Under the security classification system, there are four levels of classification, indicating varying degrees of damage to the nation that would ensue from disclosure of the designated information. Documents that receive classifications indicating greater sensitivity must be maintained under more stringent conditions. There is, in addition, another system of so-called "privacy markings" for information that does not require a security classification, but does warrant protection: see Franks Report, *supra*, note 293, paras. 60-64, at 28-29.

The recent case of *R. v. Ponting*[302] raises issues that are of special pertinence to this Reference. Particularly interesting is the fact that, although the offence created by section 2 had been interpreted as being one of absolute liability, in the *Ponting* case the jury acquitted the accused despite an admission that in fact confidential goverment information had been disclosed without authority.[303]

Mr. Ponting was an employee in the Ministry of Defence who held the position of assistant secretary in charge of a section of the Ministry dealing with naval operations. He disclosed to an Opposition Member of Parliament documents evidencing the government's attempt to conceal from the House of Commons Select Committee on Foreign Affairs the fact that, during the so-called "Falklands War", the Argentine heavy cruiser "General Belgrano" had actually been sailing away from, rather than into, the restricted naval zone established by the British around the Falkland Islands at the time the Royal Navy, with Cabinet approval, torpedoed and sunk the ship.[304]

As a defence to the charge brought against him, Mr. Ponting maintained that he had a right, and arguably a duty, to prevent Parliament from being seriously misled by the government. He alleged that the government had acted not only dishonourably, but unconstitutionally as well. Moreover, Mr. Ponting justified his actions on the basis that he believed that he was being required to assist Ministers in their efforts to evade, throught deceit, legitimate Parliamentary scrutiny.[305]

(ii) Statutory Non-Disclosure Provisions

Unlike the *Official Secrets Act 1911*, other statutory provisions prohibiting disclosure of information have received little attention in the United Kingdom.[306] In 1972, the Franks Committee compiled a list of sixty-one such provisions, which were to be found in statutes enacted between 1920 and 1971;

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[300] See Friedland, *National Security: The Legal Dimensions* (1980), at 36.

[301] See McDonald Commission Report, *supra*, note 106, at 4-5.

[302] Unreported (January 28-February 11, 1985, Central Criminal Court).

[303] For details of the trial and background events, see "Ponting Cites Treasury Ruling", *The Times*, London (February 6, 1985), at 2. See, also, Ponting, *The Right to Know* (1985), ch. 2, and Smith, "Official Secrets", [1985] Crim. L. Rev. 318.

[304] See "MP Tells of Secret Report on Belgrano", *The Times*, London (September 3, 1984), at 1, and "MP's Offer to Belgrano Trial Man", *The Times*, London (August 27, 1984), at 1.

[305] See Drewry, "The Ponting Case — Leaking in the Public Interest," [1985] Pub. L. 203, at 204.

[306] But see Cripps, *supra*, note 294, at 628-31, and Franks Report, *supra*, note 293, para. 196, at 72-73, and Appendix V, at 131-33. See, also, The Law Commission, *Breach of Confidence* (Law Com. No. 110, Cmnd. 8388, 1981), paras. 5.23-5.32, at 174-80.

this list, however, did not purport to be comprehensive.[307] Each of the enumerated provisions provided that an unauthorized disclosure of a specified type of information was a criminal offence. It would appear that the language of the provisions varied considerably, so that the precise nature of the duty of secrecy differed with particular provisions.[308] The sanctions provided for breach of these provisions appeared to vary in severity as well.

(iii) Proposals for Reform

Within the last fifteen years in the United Kingdom, two Reports have recommended reform of section 2 of the *Official Secrets Act 1911*. We have already made reference to the first of these, the Report of the Franks Committee. The second was a White Paper, *Reform of Section 2 of the Official Secrets Act 1911*,[309] issued by the government in 1978, which was based on the recommendations of the Franks Committee. We shall consider each of these Reports in turn.

a. The Franks Report

The Franks Committee was appointed by the Home Secretary in April, 1971 "to review the operation of section 2 of the Official Secrets Act 1911 and to make recommendations".[310] Its Report was submitted to Parliament in September, 1972.

The Franks Committee concluded that it was essential to change section 2. The following passage explains its reasons:[311]

> The first part of our terms of reference was to review the operation of section 2. Part I of this Report has described what we found as a result of this review. We found section 2 a mess. Its scope is enormously wide. Any law which impinges on the freedom of information in a democracy should be much more tightly drawn. A catch-all provision is saved from absurdity in operation only by the sparing exercise of the Attorney General's discretion to prosecute. Yet the very width of this discretion, and the inevitably selective way in which it is exercised, give rise to considerable unease. The drafting and interpretation of the section are obscure. People are not sure what it means, or how it operates in practice, or what kinds of action involve real risk of prosecution under it.
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> A quite different issue arises from the taint of espionage which surrounds section 2. There is a widely held view that the Official Secrets Acts should be concerned only with spies and traitors. For the most part these Acts deal with espionage, the protection of defence establishments and matters of that kind. Section 2 stands out as a conspicuous exception. It deals with information of all kinds, and it catches people who have no thought of harming their country. Many

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[307] See Franks Report, *supra*, note 293, Appendix V, at 132-33.

[308] See *ibid.*, Appendix V, para. 5, at 131.

[309] United Kingdom, *Reform of Section 2 of the Official Secrets Act 1911* (Cmnd. 7285, 1978) (hereinafter referred to as "White Paper").

[310] Franks Report, *supra*, note 293, para. i, at 1.

[311] *Ibid.*, paras. 88-89, at 37.

consider it wrong that such a provision should appear side by side with the rest of the Official Secrets Acts.

The Committee proposed that section 2 should be repealed and replaced by narrower and more specific provisions. However, it was of the view that such provisions should not be included in the *Official Secrets Act 1911 to 1939*. It believed that the mischief against which these provisions would be directed — leakage of government information — was distinguishable from espionage, which was the focus of the balance of the *Official Secrets Act 1911 to 1939*. Accordingly, the Committee recommended that the new provisions, which were to replace section 2, should constitute a separate statute, to be known as the *Official Information Act*.[312]

The Franks Committee was of the view that the protection of the criminal law should be given only to those types of official information that are "most important to protect".[313] While other information might warrant protection from unauthorized disclosure, this should be achieved by measures other than the criminal law.

The Franks Committee then proceeded to identify the types of government information that, in its view, should continue to be protected by criminal sanctions.[314] In addition, it considered the duty of Crown servants to protect official information and their liability to prosecution in connection with an unauthorized disclosure.[315]

The Committee recommended that, with respect to the information covered under the proposed *Official Information Act*, the duty of protection should rest on a broad spectrum of Crown servants, including Cabinet Ministers, civil servants, and members of the armed forces and police forces.[316] It further proposed that the *Official Information Act* should provide that it is an offence for a Crown servant to communicate information to which the Act applies, contrary to his official duty.[317] This would represent a reversal of the offence under section 2(1)(a) of the *Official Secrets Act 1911*, which appears to make all communication *prima facie* illegal, unless authorized or in the interest of the State. The Franks Committee also recommended that the Act clarify the *mens rea* necessary for there to be an offence.[318] Finally, it recommended that "failure by a Crown servant to take reasonable care of an official document or information to which the Official Information Act applies, or failure to comply with directions given on behalf of the Crown about the return or disposal of such a document, or the retention of such a document contrary to his official duty, should be offences''.[319]

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[312] *Ibid.*, para. 103, at 41.

[313] *Ibid.*, para. 110, at 44. See, generally, *ibid.*, paras. 106-10, at 42-44.

[314] See, generally, *ibid.*, chs. 9-12.

[315] The Committee also considered the liability to prosecution of other persons authorized to handle official information, such as government contractors (*ibid.*, ch. 14), and other persons who have in their possession information that has been communicated in violation of the proposed legislation (*ibid.*, ch. 15).

[316] *Ibid.*, para. 215, at 80.

[317] *Ibid.*, para. 217, at 80.

[318] *Ibid.*, para. 221, at 81-82.

b. The White Paper

In July, 1978, the British government presented to Parliament a White Paper, entitled *Reform of Section 2 of the Official Secrets Act 1911*.[320] In it, the government indicated that it largely accepted the underlying philosophy and recommendations of the Franks Report, although it did depart from certain of its proposals in important respects.

For our purposes, it is sufficient to note first, that the government reiterated the criticisms of section 2 of the *Official Secrets Act 1911* that were made by the Franks Committee with respect to the uncertainty of the provision and its excessive breadth, and, secondly, that it agreed that section 2 should be replaced with provisions that would direct criminal sanctions against a narrower range of government information.[321]

4. UNITED STATES

(a) POLITICAL ACTIVITY

(i) Introduction: The Political Context

The meaning of political neutrality in the United States is determined, in large part, by the structure of its government institutions. This section begins, therefore, by examining the implications for political neutrality in the United States of that country's presidential system of government; comparisons are made with the parliamentary-cabinet system in Canada and Britain. Against this background, the ethos of political neutrality in the United States is considered, with particular reference to the evolution and present nature of political patronage in that jurisdiction. This, in turn, provides an appropriate context for the subsequent review of the historical and current restrictions on political activity by public employees in the United States.

a. Political Neutrality in the United States

(1) Institutional Considerations

In Canada and Britain, the executive and legislative powers of government are fused because the members of the political executive — the Prime Minister and the Cabinet — are normally also members of the legislature. In the United States, however, there is a separation of governmental powers among the executive, legislative and judicial branches of government.[322] Accordingly, the President and Cabinet are excluded from membership in the legislature. These structural differences between presidential and parliamentary systems of government have important implications for the role of the public service in the political system.

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[319] *Ibid.*, para. 222, at 82.

[320] White Paper, *supra*, note 309.

[321] However, with respect to the classes of information that should be protected by the threat of criminal liability, the White Paper differed, to a degree, from the Franks Report.

Unlike Canada and Britain, there is in the United States a competition for control over the public service between the executive (the President) and the legislature (the Congress).[323] In general, it can be said that the President has a sense of responsibility to the broad public interest and is concerned about the efficient and effective administration of government; members of the Congress tend to have somewhat narrower interests and to be concerned about such matters as bureaucratic abuse of power and bureaucratic decisions that affect their constituents adversely. It is significant also that in the United States leadership in the executive and legislative branches is not only provided by different persons but may also be provided by persons from different political parties.

For this discussion, the single most important result of these structural differences is that there is in the United States no equivalent to the doctrine and practice of ministerial responsibility. Whereas in Britain and Canada ultimate responsibility for the public service is focussed on individual ministers and on the Cabinet as a collectivity,[324] responsibility for the public service in the United States is divided between the executive and legislative branches of government.[325] The source of accountability for public servants is therefore less clear in the United States. The absence of the requirement of ministerial responsibility, and of the special importance of public service anonymity that flows from it, constitutes a major difference between the model of political neutrality in the United States and that in Canada and Britain. Except for this difference, and the institutionalized practice of patronage appointments at the senior levels of the federal public service, discussed below, the ethos of political neutrality in the United States public service is similar to that in Canada and Britain. This can be seen from the following brief examination in the United States context of the tenets of the doctrine of political neutrality discussed in chapter 2. The tenet relating to political patronage is considered separately.

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[322] See, generally, Friedrich, "Responsible Government Service Under the American Constitution", in Friedrich, Beyer, Spero, Miller and Graham (eds.), *Problems of the American Public Service* (1935), ch. 5; Ripley and Franklin, *Congress, the Bureaucracy, and Public Policy* (1976), at 4-5 and 10-15; and Waldo, *The Administrative State* (2d ed., 1984), ch. 7.

[323] See Van Riper, *History of the United States Civil Service* (1958), at 392-94.

[324] For a discussion of the doctrine of ministerial responsibility, see *supra*, ch. 2.

[325] For a discussion of the consequences of this division, see Van Riper, *supra*, note 323, at 559-60.

(2) *The Meaning of Political Neutrality*

There is no doubt that in the United States, politics, policy and administration are in practice intertwined. Indeed, it was primarily in the United States where the so-called politics-administration dichotomy was articulated and pursued and where the possibility of maintaining such a distinction was rejected.[326] There is widespread recognition that public servants exercise enormous power in the development and implementation of public policies and programmes. It is in part for this reason that there is also widespread concern about the extent to which public servants are appointed on political grounds and the extent of their participation in partisan politics.

The arguments for and against the existing restraints on the involvement of federal and state employees in partisan politics are examined below.[327] As in Canada and Britain, opposition to extending the permissible political activities of public servants is based, to a large extent, on the desire to preserve the political neutrality of the public service. It is notable, however, that there is more emphasis in the United States on maintaining restrictions on political activity so as to guard against political coercion of the public by public servants and of public servants by their supervisors.[328] There is also much more concern about the possibility of public servants being subjected to political coercion by their unions.[329]

The issue of political partisanship is closely related to that of public comment, that is, the right of public servants to express publicly their personal views on government policies and programmes. As will be discussed in subsequent sections of this chapter, federal public servants in the United States are permitted to express their views on a candidate in public, but they are not allowed to campaign actively for partisan candidates.[330] They are permitted to express their views as citizens on political questions and public issues, but they are well advised to show restraint in their criticism of government policy, especially if it concerns their own agency and especially if they hold policy advisory or other sensitive positions in the service.[331] They are expected to express any criticism of the decisions of their superiors privately and through bureaucratic channels. However, in certain circumstances, they may be permitted under whistleblowing legislation to speak out publicly against government wrongdoing.[332] In addition, the tradition or custom of official reticence may be complemented by written codes of conduct that vary somewhat in their enforcement from one agency to another.[333] As a general proposition it may be said that, while federal employees in the United States, as citizens, enjoy freedom under the American Bill of Rights to discuss matters of public concern, they are expected to refrain from public comment that puts into question their impartiality and their loyalty to their agency or to the government as a whole.[334]

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[326] For an account of the evolution of the theory of the separation of policy and administration, see Wilson, *Canadian Public Policy and Administration: Theory and Environment* (1981), ch. 4. See, also, Mosher, *Democracy and the Public Service* (1968), at 4-7 and 64-70.

[327] See *infra*, this ch., sec. 4(a)(iv).

[328] *Ibid*.

[329] *Ibid*.

[330] See *infra*, this ch., sec. 4(a)(iii)a.(2).

[331] See *infra*, this ch., sec. 4(b)(iii).

[332] See *infra*, this ch., sec. 4(b)(iv)e.

As noted above, political neutrality in the United States does not include any notion of ministerial responsibility. As a result, public servants cannot count on protection by their political or administrative superiors against criticism either by legislators or members of the public. Although public servants may on occasion be shielded by their superiors from public criticism, the interest of Congressional committees, pressure groups and the news media in the activities of public servants significantly reduces their anonymity and emphasizes their personal responsibility for their own actions. Thus, public servants in the United States tend to be much more visible than their counterparts in Canada and Britain.

Nevertheless, career federal employees in the United States can normally expect to enjoy security of tenure as long as they do not engage in activities that put into question their impartiality and their loyalty to their agency or to the government as a whole.

Patronage appointees, on the other hand, are of course usually replaced when a change of government takes place. There is a larger number of patronage appointments to public service posts in the United States (both on the national level and in the states) than there is in Canada. Thus, it is important to discuss the patronage dimension of political neutrality in the United States by examining the nature and extent of political patronage there.

(3) Political Patronage

The extent of political patronage in the United States varies from one government to another. In the federal sphere of government, political patronage gradually declined after 1883; however, there have been some periods, such as the early years of the New Deal in the 1930's, in which patronage appointments increased. Also, in 1953, President Eisenhower created Schedule C, which was outside the regular civil service rules of appointment, to make more patronage appointments available to the new Republican Administration.[335] Nevertheless, "[c]ontemporary Presidents are more concerned to use appointments to secure able men who will support their policy and effectively administer it, and to trade appointments for legislative and political program support, than with running a large-scale partisan employment service". Moreover, "[p]urely partisan federal patronage is mainly in the field, where congressmen seek appointments for constituents, with an eye to elections."[336]

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[333] See *infra*, this ch., sec. 4(b)(ii).

[334] See *infra*, this ch., secs. 4(b)(ii) and (iii).

[335] For a detailed analysis of these historical periods, see Van Riper, *supra*, note 323.

It is notable that the merit system can be manipulated by a President who is determined to provide public service posts for his supporters. President Nixon's efforts in this direction have been well documented.[337] One commentator has asserted that "[a]ll administrations have sought jobs for political supporters and, in so doing, violated civil service provisions. The Nixon attack on the civil service, however, went beyond these 'patronage raids' and threatened 'free government' by seeking to exploit the vulnerability of the civil service to gain the ability to manipulate and violate the law".[338]

In the state and local spheres of government, the extent of political patronage varies greatly from one government to another. In some states, patronage is negligible, but in other states, in many county governments and in some large cities, it is still very extensive.[339]

Of special interest for this discussion is the fact that, unlike Canadian and British practice, a large number of political appointments are made to the most senior positions in the United States federal public service. There is, as a result, a significant turnover of senior public servants with a change of government. The distinction between career employees and political appointees is by no means clear. A leading authority on this matter has concluded that "[d]epending on who is doing the counting, ... anything from 9 percent to 25 percent of the [7,000] executive supergrade positions can be considered as political appointments".[340] A large number of these appointments are made by the President alone or by the President with the advice and consent of the Senate; others are made by department and agency heads. Thus, the practice of making patronage appointments at the most senior echelons of the federal public service is institutionalized in the United States. Political appointees continue to participate in partisan politics and enjoy limited tenure in office.[341]

As discussed below, the political restrictions imposed upon civil servants in the United States were intended as a response to the practices of political patronage and political corruption, both of which were relatively widespread at the time. In order to place these political restrictions in their proper context, therefore, it is useful to examine briefly the historical environment out of which they were derived.

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[336] Mainzer, *Political Bureaucracy* (1973), at 97.

[337] Vaughn, "Restrictions on the Political Activities of Public Employees: The Hatch Act and Beyond" (1976), 44 Geo. Wash. L. Rev. 516, at 540-50.

[338] *Ibid.*, at 540.

[339] See Nigro, *Modern Public Administration* (1965), at 297.

[340] Heclo, *A Government of Strangers: Executive Politics in Washington* (1977), at 40.

[341] There is some support for the adoption of a similar system in the federal and provincial spheres of Canadian government: see Kernaghan, "The Hired Help" (1984), 5 Policy Options Politiques, No. 5, 45.

b. Historical Background

The long history of efforts to restrict the political activity of federal employees in the United States need only be briefly mentioned.[342] The practice of political patronage in the United States reached its height during the Civil War years, but its roots lay in the establishment of the so-called ''spoils system'' by President Andrew Jackson, who took office in 1829. This system involved the selection of public servants on the basis of support for the governing party and the ''rotation'' of a multitude of public servants with a change of government. Popular sentiment gradually turned against this system because it was excessively partisan and extremely inefficient.

While attempts by the executive to restrict political activity date from the beginning of American history, the first legislative action occurred in 1883, with the passage of the Pendleton Act.[343] That Act was intended to alter the fundamental nature of the federal bureaucracy, from a system based on patronage to one based on merit. The Act established a bi-partisan Civil Service Commission and provided for open competitive examinations and for protection for civil servants from pressure to engage in political activities. Although the Pendleton Act proscribed certain specific acts of political coercion, it did not expressly prohibit voluntary political activity by civil servants. Nevertheless, it did authorize the President to make any rules deemed necessary to prevent political coercion by government officers. In 1907, pursuant to that authority, President Theodore Roosevelt issued an executive order that prohibited employees of the classified civil service from taking an ''active part in political management or in political campaigns''.[344] This prohibition was incorporated into the Civil Service Rules and, it will be seen, is retained in the current statutory provision.

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[342] For an historical account of these efforts see, for example, Eccles, *The Hatch Act and the American Bureaucracy* (1981), at 1-105; Vaughn, *supra*, note 337, at 516-18; American Enterprise Institute for Public Policy Research, ''Hatch Act Revision'' (Legislative Analysis No. 20, 95th Cong., 1978) (hereinafter referred to as ''Hatch Act Revision''), at 1-3; H.R. Rep. No. 444, 94th Cong., 1st Sess. (1975) (hereinafter referred to as ''House Report''), reprinted in *Documentary Background and Legislative History to the Federal Employees' Political Activities Act of 1976*, Subcommittee on Employee Political Rights and Intergovernmental Programs of the Committee on Post Office and Civil Service, 94th Cong., 2d Sess. (1976) (hereinafter referred to as ''Documentary Background'') 61, at 68-72; S. Rep. No. 512, 94th Cong., 1st Sess. (1975) (hereinafter referred to as ''Senate Report''), reprinted in Documentary Background, 255, at 256-57; and 1 *Commission on Political Activity of Government Personnel, A Commission Report: Findings and Recommendations* (1968) (hereinafter referred to as ''Commission Report''), at 7-11.

[343] Civil Service Act of 1883, ch. 27, 22 Stat. 403 (codified in scattered sections of 5 U.S.C.).

[344] The order read, in part, as follows:

> Persons, who by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express privately their opinions on political subjects, shall take no active part in political management or in political campaigns.

Executive Order No. 642 (June 3, 1907), quoted in Vaughn, *supra*, note 337, at 518, *n.* 8.

During the period from 1907 to 1939 there was a significant expansion of the federal bureaucracy, primarily due to the agencies and programmes established during the Depression era. Most of the expansion occurred, however, outside the classified civil service, thereby increasing the number of federal employees who were not subject to the political neutrality rule. Concern about the political activities of civil servants grew as allegations of corruption were made in the 1938 election campaign. Reports that local party officials were soliciting workers for financial contributions, particularly at the Works Project Administration, as a condition of the workers' employment, led to a recommendation that legislation be enacted to prohibit the political coercion of all federal employees, in both the classified and unclassified service.[345] The Hatch Act,[346] an Act "to prevent pernicious political activities", was enacted in 1939 in response to this period of political corruption. The Act incorporated the prohibition against voluntary political activity and extended its application to both the classified and unclassified civil service. The most significant amendment to the Hatch Act came the following year when, among other things, the Act was amended to apply to state and local employees whose principal employment was in connection with an activity financed by the federal government.[347] These restrictions on state and local employees remained until 1974, when they were largely removed.[348]

Having examined the political and historical context within which the restrictions on political activity arose in the United States, and as a preface to a more detailed discussion of the current regime, it is important to consider the constitutional challenges that have been made to these restrictions, and their resolution by the United States Supreme Court.

(ii) Constitutional Considerations

Any discussion of the regulation of political activity by public employees in the United States must include a consideration of the implications of the American Bill of Rights which, like the *Canadian Charter of Rights and Freedoms*,[349] governs all State action. The constitutional validity of the limitations on political activity of public employees in the United States has generally been considered in light of the First Amendment to the American Bill of Rights, which encompasses both freedom of speech and freedom of assembly.[350] The First Amendment provides:

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[345] See Senate Report, *supra*, note 342, at 257.

[346] 53 Stat. 1147 (1939).

[347] 54 Stat. 767 (1940).

[348] Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

[349] *Supra*, note 4.

[350] In *United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The First Amendment protections of speech and assembly include, by implication, association.[351]

It appears that the American courts have repeatedly described the First Amendment rights as standing in a preferred position in terms of constitutional protection.[352] The rationale for the courts' vigilance in the protection of the First Amendment freedoms lies in their special values and functions to a democratic society. In speaking of the freedom of speech and thought, Cardozo J. observed:[353]

> Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom.

The American courts have recognized that freedom of speech and the activities protected by the First Amendment are peculiarly vulnerable to a deterrent or "chilling" effect where laws fail to aim specifically at matters within the allowable area of government regulation but extend to control or prohibit activities that are protected by the First Amendment guarantees of freedom of speech, of the press, of assembly and of petition. In response, the doctrine of overbreadth has been developed. As Tribe explains,[354] the usual approach of constitutional adjudication — that is, gradually cutting away the unconstitutional aspects of a statute by invalidating its improper applications case by case — does not respond sufficiently to this deterrent effect, since an overbroad law hangs over the heads of citizens like a sword of Damocles. The fact that the courts may ultimately rescue those whose speech or conduct in retrospect is held to be protected is not enough, "for the value of a sword of Damocles is that it hangs — not that it drops."[355]

(1947) (subsequent references are to 330 U.S.), the leading case on political activity by public employees, it was also alleged that, in addition to violating the First Amendment, the restrictions violated the Ninth and Tenth Amendments protecting political activity and the Fifth Amendment, which guarantees due process. It does not appear that the claimants in any of the leading cases discussed below have attempted to characterize limitations on either political or critical comment or political activity as violations of the equal protection provision of the Fourteenth Amendment, which is roughly analogous to s. 15 of the Charter, *supra*, note 4. For a discussion of s. 15, see *supra*, ch. 3, sec. 4(d)(iv).

[351] *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612 (1976), and *NAACP v. Button*, 371 U.S. 415, 83 S. Ct. 328 (1963).

[352] See Tribe, *American Constitutional Law* (1978), at 576-734, and Gunther (ed.), *Constitutional Law* (11th ed., 1985), at 972-79.

[353] *Palko v. Connecticut*, 302 U.S. 319, at 327, 58 S. Ct. 149 (1937).

[354] *Supra*, note 352, at 711, citing *Arnett v. Kennedy*, 416 U.S. 134, at 231, 94 S. Ct. 1633 (1974), Marshall J. dissenting.

[355] Tribe, *supra*, note 352, at 711.

The solution adopted by the courts is either to invalidate such an overbroad law altogether or to narrow its scope by judicial interpretation. It appears, however, that the courts will be less willing to invalidate an overbroad law that restricts conduct than one that interferes with "pure speech".[356]

The United States Supreme Court first considered the constitutionality of limitations on political activity by federal employees in 1947, in *United Public Workers of America (C.I.O.) v. Mitchell*.[357]

In that case, the plaintiff Poole[358] had been employed as a roller in the United States mint. He had been dismissed for having acted as a ward committeeman of a political party and having been politically active as a worker at the polls and a paymaster for the services of other party workers. Both the majority and dissenting judges agreed that the plaintiff's activities fell within the prohibition of section 9(a) of the Hatch Act.[359] Section 9(a) of the Act forbade officers and employees in the executive branch of the federal government, with exceptions, from taking "any active part in political management or in political campaigns".[360]

Section 9(a) of the Hatch Act was challenged as being unconstitutional on various grounds: first, that it violated the First Amendment by denying federal employees freedom of speech, of the press, and of assembly; secondly, that it violated the Ninth and Tenth Amendments by denying federal employees the right to engage in political activity; and thirdly, that it violated the Fifth Amendment by depriving federal employees of a liberty enjoyed by other citizens, by arbitrarily and unreasonably discriminating between federal employees and other persons, and by being so vague and indefinite as to prohibit lawful, as well as unlawful, activities.

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[356] See discussion *infra*, this sec., regarding *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908 (1973) (subsequent references are to 413 U.S.). The distinction between conduct and speech or expression has been sharply criticized by Brennan J., dissenting in *Broadrick*, and by Tribe, *supra*, note 352, at 599-600, where he states:

> The trouble with the distinction between speech and conduct is that it has no real content. All communication except perhaps that of the extrasensory variety involves conduct. Moreover, if the expression involves talk, it may be noisy; if written, it may become litter. So too, much conduct is expressive, a fact the Court has had no trouble recognizing in a wide variety of circumstances. Expression and conduct, message and medium, are thus inextricably tied together in all communicative behaviour; expressive behaviour is '100% action and 100% expression.' It is thus not surprising that the Supreme Court has never articulated a basis for its distinction....

[357] *Supra*, note 350.

[358] The Court first determined that there was no case or controversy with respect to other plaintiffs in the action because the Court could only speculate as to the type of political activity they wished to engage in or as to the contents of their proposed public statements.

[359] Section 9(a) of the Hatch Act is now codified in 5 U.S.C. § 7324(a), reproduced *infra*, note 377.

[360] This phrase was defined by § 15 as "those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determination of the Civil Service Commission under the rules prescribed by the President." See 5 U.S.C. § 7324(a), reproduced *infra*, note 377.

In an opinion given by Reed J., the majority held that the section 9(a) restrictions were constitutionally valid. The Court invoked a reasonableness test, holding that the extent of the guarantees of freedom under the Constitution must be balanced against a Congressional enactment designed to protect society against the supposed evil of political partisanship. Finding that political activity by federal employees had been "reasonably deemed by Congress to interfere with the efficiency of the public service",[361] the Court stated:[362]

> Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objection.

The majority rejected the plaintiff's argument that the impartiality of many classified employees, including industrial workers such as the plaintiff, was a matter of complete indifference to the effective performance of their duties, and that Congress had gone further than necessary in prohibiting political activity by all types of classified employees. Reed J. acknowledged that a concern regarding the public perception of impartiality might not arise with respect to certain employees, such as industrial workers. He suggested, however, that Congress may have been concerned that political activity by such employees might have an effect on their advancement within the service, giving rise to potential coercion. He stated:[363]

> For regulation of employees *it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service*.... Evidently what Congress feared was the cumulative effect on employee morale of political activity by all employees who could be induced to participate actively. It does not seem to us an unconstitutional basis for legislation.

The scope of Congressional power to limit the political activity of federal employees appears to have been broadly cast. The Court concluded that, so far as the constitutional power under review was concerned, any distinction to be made between the regulation of administrative workers and industrial workers, and the weight to be given such differences, were matters of detail for Congress. The Court stated:[364]

> The determination of the extent to which political activities of government employees shall be regulated lies primarily with Congress. Courts will interfere only when such regulation passes beyond the generally existing conception of

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[361] *United Public Workers of America (C.I.O.) v. Mitchell, supra*, note 350, at 101.

[362] *Ibid.*, at 99.

[363] *Ibid.*, at 101 (emphasis added).

[364] *Ibid.*, at 102.

> governmental power. That conception develops from practice, history, and changing educational, social and economic conditions.

Two strong dissents were given in *Mitchell* by Justices Black and Douglas. Black J. held that section 9(a) of the Hatch Act was too broad, ambiguous and uncertain in its consequences to be made the basis of removing deserving employees from their jobs. While acknowledging the legitimacy of Congressional concern for both ensuring impartiality and avoiding patronage and coercion, he argued that laws could be drawn to address those concerns without suppressing the political freedom and freedom of speech of millions of citizens. He stated:[365]

> Legislation which muzzles several million citizens threatens popular government, not only because it injures the individuals muzzled, but also because of its harmful effect on the body politic in depriving it of the political participation and interest of such a large segment of our citizens. Forcing public employees to contribute money and influence can well be proscribed in the interest of 'clean politics' and public administration. But I think the Constitution prohibits legislation which prevents millions of citizens from contributing their arguments, complaints, and suggestions to the political debates which are the essence of our democracy; prevents them from engaging in organizational activity to urge others to vote and take an interest in political affairs; bars them from performing the interested citizen's duty of insuring that his and his fellow citizens' votes are counted. Such drastic limitations on the right of all the people to express political opinions and take political action would be inconsistent with the First Amendment's guaranty of freedom of speech, press, assembly, and petition....

Douglas J. began his dissenting decision with a discussion of the rationale underlying the principle of political neutrality of the civil service:[366]

> The civil service system has been called 'the one great political invention' of nineteenth century democracy. The intricacies of modern government, the important and manifold tasks it performs, the skill and expertise required, the vast discretionary powers vested in the various agencies, and the impact of their work on individual claimants as well as on the general welfare have made the integrity, devotion, and skill of the men and women who compose the system a matter of deep concern of many thoughtful people. Political fortunes of parties will ebb and flow; top policy men in administrations will come and go; new laws will be passed and old ones amended or repealed. But those who give continuity to administration, those who contribute the basic skill and efficiency to the daily work of government, and those on whom the new as well as the old administration is dependent for smooth functioning of the complicated machinery of modern government are the core of the civil service. If they are beneficiaries of political patronage rather than professional careerists, serious results might follow — or so Congress could reasonably believe. Public confidence in the objectivity and integrity of the civil service system might be so weakened as to jeopardize the effectiveness of administrative government. Or it might founder on the rocks of incompetency, if every change in political fortunes turned out the incumbents, broke the continuity of administration, and thus interfered with the development of expert management

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[365] *Ibid.*, at 111.

[366] *Ibid.*, at 121-22.

> at the technical levels. Or if the incumbents were political adventurers or party workers, partisanship might color or corrupt the processes of administration of law with which most of the administrative agencies are entrusted.
>
> The philosophy is to develop a civil service which can and will serve loyally and equally well any political party which comes into power.

Douglas J. emphasized, however, that, in limiting political activity, a relevant distinction could be made between administrative and industrial employees. While he acknowledged that the considerations that he had outlined in the passage quoted above might well apply to civil servants in the administrative category, in his view, they would not apply to an industrial worker who was remote from contact with the public or from policy making. He argued that the supposed evils arising from political activity were both different, and narrower, in the case of industrial workers than they were in the case of the administrative group. He acknowledged that "the evils of the 'spoils' system" did not end with the administrative group, and that the public had a legitimate concern in the preservation of an unregimented industrial group, a group free from political pressures of superiors who use their official power for a partisan purpose. However, he suggested that these were "specific evils which would require a specific treatment".[367]

Emphasizing the basic and fundamental nature of the rights that were being sacrificed, he pointed out that, in other situations where the balance was between the constitutional rights of individuals and the community interest which sought to qualify those rights, the Supreme Court had insisted that the statute be "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest" of government.[368]

The constitutionality of the Hatch Act limitations on political activity[369] was again considered by the United States Supreme Court in 1973 in *United States Civil Service Commission v. National Association of Letter Carriers*.[370] Section 15 of the Act defined the phrase in section 9(a), "taking an active part in political management or in political campaigns", as follows:

> [T]hose acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.

The Court reaffirmed the principle, established in *Mitchell*, that the state can constitutionally restrict political activity by federal employees. On the issue of vagueness and overbreadth of the section 15 definition, the Court found that the 1940 rules referred to in the Hatch Act had been refined and restated in

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[367] *Ibid.*, at 123.

[368] *Ibid.*, at 124.

[369] 5 U.S.C. § 7324(a), reproduced *infra*, note 377.

[370] 413 U.S. 548, 93 S. Ct. 2880 (1973) (subsequent references are to 413 U.S.).

1970 by the Civil Service Regulations specifying prohibited conduct. While the Court acknowledged that there might be some "quibble" over the precise meaning of the wording used in the regulations, it was satisfied that it was sufficiently comprehensible to allow reasonable conduct:[371]

> There are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.

In *Broadrick v. Oklahoma*,[372] rendered the same day as the *Letter Carriers* decision, the United States Supreme Court also upheld the Oklahoma "Little Hatch Act".[373] Paragraph seven of the Act prohibited civil servants from taking part "in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote." The State Personnel Board had established a set of five rules governing the prescriptions. The plaintiffs alleged that the restrictions, which went so far as to expressly limit such activities as wearing political buttons or displaying a bumper sticker, were so vague and overbroad as to be invalid.

The majority of the Court held that the restrictions were valid. White J. observed that the Oklahoma Act restricted the political activities of the state's civil servants "in much the same manner" as the Hatch Act. While acknowledging that the legislation could have a chilling effect on such admittedly permissible speech as wearing a political button, he maintained that the potential deterrence of protected speech could not justify invalidating the statute on its face. Observing that, as a matter of fact, the plaintiffs had been dismissed for conduct that clearly could be constitutionally restricted, he stated:[374]

> To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. It is our view that § 818 is not substantially overbroad and that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may be applied.

In a dissenting judgment, Brennan J. found the limitiations of the Oklahoma Act to be both vague and overbroad. He distinguished the critical phrases of the Hatch Act, which were defined by reference to a complex network of regulations, from the critical phrase in the Oklahoma Act, which was left almost wholly undefined except for "a scant five rules that shed no light at all on the intended reach of the statute". He observed that the State had failed to provide the necessary "sensitive tools" to carry out the "separation of legitimate from illegitimate speech".[375] Brennan J. also vigorously rejected the distinction made by the majority between protection of speech and of conduct, emphasizing that it is often difficult to distinguish between the two. In his view, speech and conduct were equally protected under the First Amendment.

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[371] *Ibid.*, at 579.

[372] *Supra*, note 356.

[373] Merit System of Personnel Administration Act, Okla. Stat. Ann., Tit. 74, § 818.

[374] *Supra*, note 356, at 615-16.

(iii) The Current Position

a. Federal Employees: the Hatch Act

(1) Application

In its present form, the Hatch Act[376] prohibits employees in Executive agencies, and individuals employed by the government of the District of Columbia, from engaging in two distinct, yet related types of activity: (1) using their official authority or influence for the purpose of interfering with or affecting the result of an election; and (2) taking an active part in political management or in political campaigns.[377] Exempted from the latter prohibition, although not from the former, are the following: (1) employees paid from the appropriation for the office of the President; (2) the heads or assistant heads of an executive or military department; (3) employees appointed by the President, by and with the advice and consent of the Senate, who are involved in national and international policy formulation; and (4) certain officials of the District of Columbia government.[378] It is interesting to note that high level public employees, especially those involved in policy making, are the very employees who are most severely restricted in the United Kingdom and Canada; yet they are exempted entirely from the restrictions in the United States. These exceptions were necessitated, however, by the political system in the United States, which provides for a level of political appointments above the civil service policy makers.

(2) Political Activity

The Hatch Act prohibits employees from taking "an active part in political management or in political campaigns". That phrase is defined in the Act to mean those acts that were determined by the Civil Service Commission to be prohibited under the prescribed rules prior to July 19, 1940.[379] In effect, therefore, the Act incorporates approximately 3,000 pre-1940 Civil Service Commission rulings. Accordingly, political activity that is within the prohibition of prior Civil Service Commission rulings, but that is not expressly permitted by the Hatch Act, is prohibited.[380]

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[375] *Ibid.*, at 628, citing *Speiser v. Randall*, 357 U.S. 513, 78 S. Ct. 1332 (1958).

[376] The provisions of the Hatch Act, as amended, are codified in various sections of 18 U.S.C. and 5 U.S.C., to which subsequent references will be made.

[377] 5 U.S.C. § 7324(a) (1982) provides as follows:

> An employee in an Executive agency or an individual employed by the government of the District of Columbia may not —
>
> (1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or
>
> (2) take an active part in political management or in political campaigns.
>
> For the purpose of this subsection, the phrase 'an active part in political management or in political campaigns' means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.

[378] 5 U.S.C. § 7324(d) (1982).

The statutory proscription against taking an active part in political management or in political campaigns has also been elaborated in the United States Code of Federal Regulations,[381] which have been characterized as "draw[ing] lines between partisan and nonpartisan political activities, between active organization or leadership and mere individual participation, between solicitation of support and mere expression of opinion".[382] Pursuant to section 733.122(b) of the Regulations, prohibited activities include, but are not limited to, the following:

(1) Serving as an officer of a political party, a member of a National, State or local committee of a political party, an officer or member of a committee of a partisan political club, or being a candidate for any of these positions;

(2) Organizing or reorganizing a political party organization or political club;

(3) Directly or indirectly soliciting, receiving, collecting, handling, disbursing, or accounting for assessments, contributions, or other funds for a partisan political purpose;

(4) Organizing, selling tickets to, promoting, or actively participating in a fund-raising activity of a candidate in a partisan election or of a political party, or political club;

(5) Taking an active part in managing the political campaign of a candidate for public office in a partisan election or a candidate for political party office;

(6) Becoming a candidate for, or campaigning for, an elective public office in a partisan election;

(7) Soliciting votes in support of or in opposition to a candidate for public office in a partisan election or a candidate for political party office;

(8) Acting as recorder, watcher, challenger, or similar officer at the polls on behalf of a political party or a candidate in a partisan election;

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[379] 5 U.S.C. § 7324(a) (1982), reproduced *supra*, note 377.

[380] Vaughn, *supra*, note 337, at 519.

[381] 5 C.F.R. § 733.111 (1986) (permissible activities), and 5 C.F.R. § 733.122 (1986) (prohibited activities).

[382] "Developments in the Law — Public Employment" (1984), 97 Harv. L. Rev. 1611 (hereinafter referred to as "Developments in the Law"), at 1653.

(9) Driving voters to the polls on behalf of a political party or a candidate in a partisan election;

(10) Endorsing or opposing a candidate for public office in a partisan election or a candidate for political party office in a political advertisement, a broadcast, campaign, literature, or similar material;

(11) Serving as a delegate, alternate, or proxy to a political party convention;

(12) Addressing a convention, caucus, rally, or similar gathering of a political party in support of or in opposition to a partisan candidate for public office or political party office;

(13) Initiating or circulating a partisan nominating petition;

(14) Soliciting, collecting, or receiving a contribution at or in the Federal workplace from any employee for any political party, political fund, or other partisan recipient;

(15) Paying a contribution at or in the Federal workplace to any employee who is the employer or employing authority of the person making the contribution for any political party, political fund, or other partisan recipient; and

(16) Soliciting, paying, collecting, or receiving a contribution at or in the Federal workplace from any employee for any political party, political fund, or other partisan recipient.

Permitted political activities are to be found in both the Act and the Regulations. The Act contains a provision authorizing the Office of Personnel Management to prescribe regulations permitting certain individuals, otherwise within the prohibition, to take an active part in political management and political campaigns involving the municipality in which they reside.[383] Essentially this provision is designed to deal with those municipalities, in the immediate vicinity of Washington D.C. and elsewhere, in which the majority of voters are federal employees. This exception would permit federal employees, within the excepted communities, to run as independent candidates for local office against partisan political candidates. In the absence of such an exemption, the employee would be permitted to run as an independent candidate only in an election in which there were no party candidates.[384] The Act also permits

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[383] 5 U.S.C. § 7327 (1982).

[384] 5 C.F.R. § 733.124(a) (1986) provides as follows:

> Section 733.122 does not prohibit activity in political management or in a political campaign by an employee in connection with —
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> (1) A nonpartisan election, or
>
> (2) Subject to the conditions and limitations established by OPM, an election held in a municipality or political subdivision designated by OPM under paragraph (b) of this section.

Section 733.101(e) of the Regulations defines "Nonpartisan election" to mean:

> (1) An election at which none of the candidates is to be nominated or elected as representing a political party any of whose candidates for

certain national or state political activities of a nonpartisan nature. Specifically permitted are political activities in connection with a nonpartisan election, or a question that is not specifically identified with a national or state political party.[385] Finally, the Act ensures that an employee, otherwise within the prohibition against political activities, retains the right to vote and the right to express a political opinion.[386]

In addition to the above statutory provisions, section 733.111(a) of the Regulations provides that an employee retains the right to do the following:

> (1) Register and vote in any election;
>
> (2) Express his opinion as an individual privately and publicly on political subjects and candidates;
>
> (3) Display a political picture, sticker, badge, or button;
>
> (4) Participate in the nonpartisan activities of a civic, community, social, labor, or professional organization, or of a similar organization;
>
> (5) Be a member of a political party or other political organization and participate in its activities to the extent consistent with law;
>
> (6) Attend a political convention, rally, fund-raising function; or other political gathering;

> presidential elector received votes in the last preceding election at which presidential electors were selected; and
>
> (2) An election involving a question or issue which is not specifically identified with a political party, such as a constitutional amendment, referendum, approval of a municipal ordinance, or any question or issue of a similar character.

[385] 5 U.S.C. § 7326 (1982) provides as follows:

> Section 7324(a)(2) of this title [reproduced *supra*, note 377] does not prohibit political activity in connection with —
>
> (1) an election and the preceding campaign if none of the candidates is to be nominated or elected at that election as representing a party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected; or
>
> (2) a question which is not specifically identified with a National or State political party or political party of a territory or possession of the United States.
>
> For the purpose of this section, questions relating to constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character, are deemed not specifically identified with a National or State political party or political party of a territory or possession of the United States.

[386] 5 U.S.C. § 7324(b) (1982) provides as follows:

> An employee or individual to whom subsection (a) of this section applies retains the right to vote as he chooses and to express his opinion on political subjects and candidates.

(7) Sign a political petition as an individual;

(8) Make a financial contribution to a political party or organization;

(9) Take an active part, as an independent candidate, or in support of an independent candidate, in a partisan election covered by § 733.124 [reproduced *supra*, note 384];

(10) Take an active part, as a candidate or in support of a candidate, in a nonpartisan election;

(11) Be politically active in connection with a question which is not specifically identified with a political party, such as a constitutional amendment, referendum, approval of a municipal ordinance or any other question or issue of a similar character;

(12) Serve as an election judge or clerk, or in a similar position to perform nonpartisan duties as prescribed by State or local law; and

(13) Otherwise participate fully in public affairs, except as prohibited by law, in a manner which does not materially compromise his efficiency or integrity as an employee or the neutrality, efficiency, or integrity of his agency.

Notwithstanding the fact that a particular activity is permitted, employees may not engage in such political activity while on duty, while in uniform, or if the activity would interfere with the performance of official duties or involve the employee in a conflict of interest.[387]

(3) Penalties

An employee who violates the statutory prohibitions by using his official authority or influence for the purpose of interfering with or affecting the result of an election, or by taking an active part in political management or in political campaigns, must be removed from office unless, by unanimous vote, the Merit Systems Protection Board finds that the violation does not warrant removal. In that event, a penalty of not less than 30 days' suspension, without pay, must be imposed.[388]

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[387] 5 C.F.R. § 733.111(b) (1986) provides as follows:

> Paragraph (a) of this section does not authorize an employee to engage in political activity in violation of law, while on duty, or while in a uniform that identifies him as an employee. The head of an agency may prohibit or limit the participation of an employee or class of employees of his agency in an activity permitted by paragraph (a) of this section, if participation in the activity would interfere with the efficient performance of official duties, or create a conflict or apparent conflict of interests.

[388] 5 U.S.C. § 7325 (1982).

b. *State and Local Employees*

(1) The Hatch Act

As noted earlier,[389] the 1940 amendment to the Hatch Act extended the Act to state and local employees whose principal employment was in connection with an activity financed by the federal government. However, the Federal Election Campaign Act Amendments of 1974 amended the Act to remove most of the restrictions from such employees. At present, state and local employees, whose principal employment is in connection with an activity that is financed by federal funds, are prohibited from: (1) using their official authority for the purpose of interfering with or affecting the result of an election or nomination; (2) coercing state or local employees to contribute anything of value for political purposes; and (3) becoming a candidate for elective office.[390] A state or local employee is not, however, prohibited from becoming a candidate in a nonpartisan election.[391] Thus, while the general prohibition against taking an active part in political management or in political campaigns has been removed for state and local employees, a specific prohibition against becoming a candidate in a partisan election has been retained for most state and local employees.[392] As is the case with federal employees, state and local employees retain the right to vote and the right to express their opinions on political subjects and candidates.[393]

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[389] *Supra*, this ch., sec. 4(a)(i)b.

[390] 5 U.S.C. § 1502(a) (1982) provides as follows:

> A State or local officer or employee may not —
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> (1) use his official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office;
>
> (2) directly or indirectly coerce, attempt to coerce, command, or advise a State or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purposes; or
>
> (3) be a candidate for elective office.

[391] 5 U.S.C. § 1503 (1982) provides as follows:

> Section 1502(a)(3) of this title does not prohibit any State or local officer or employee from being a candidate in any election if none of the candidates is to be nominated or elected at such election as representing a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected.

[392] 5 U.S.C. § 1502(c) (1982) provides that the prohibition against becoming a candidate for elective office, contained in § 1502(a)(3) (reproduced *supra*, note 390) does not apply to the following persons:

> (1) the Governor or Lieutenant Governor of a State or an individual authorized by law to act as Governor;
>
> (2) the mayor of a city;
>
> (3) a duly elected head of an executive department of a State or municipality who is not classified under a State or municipal merit or civil-service system; or
>
> (4) an individual holding elective office.

(2) *The "Little Hatch Acts"*

In addition to the Hatch Act, all fifty states have enacted legislation ("Little Hatch Acts"), similar to the federal statute, to restrict the political activities of state and local employees.[394] Many of these State provisions were amended subsequent to the enactment of the Federal Election Campaign Act Amendments of 1974, which, as noted above, removed most of the Hatch Act restrictions as they applied to federally funded state and local employees. In 1983, the House Subcommittee on Civil Service issued a Report[395] outlining the extent to which state restrictions on political activity had changed during the period from 1975 to 1983. In addition, the Subcommittee Report considered the effect of such changes in those states where restrictions on political activity had been eliminated. The findings of the Subcommittee, with respect to the changes in state laws, were summarized as follows:[396]

> We identified 14 States, which since 1975 had changed their political activity restrictions on State and/or local employees. With the exception of Wyoming, the changes made were toward reducing or liberalizing the political activity restrictions contained in State statutory or administrative rule language. Of the 14, eight States still have political activity restrictions which are equal to or greater than the Hatch Act as it applies to State and local employees.

In respect of nine specific types of political activity identified by the Subcommittee, the following changes were noted during the relevant period:

(1) a prohibition against becoming a candidate in a partisan election[397] was removed by four states, while being retained by twenty states;[398]

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[393] 5 U.S.C. § 1502(b) (1982).

[394] Citations for the statutory and/or administrative provisions of all fifty states, as of 1973, appear in *Broadrick v. Oklahoma*, *supra*, note 356, at 604-05, *n*. 2.

[395] *Changes Since 1975 in State Restrictions on Political Activities of State and Local Employees*, House of Representatives Subcommittee on Civil Service of the Committee on Post Office and Civil Service, Print No. 98-9, 98th Cong., 1st Sess. (1983) (hereinafter referred to as "Subcommittee Report"). Citations for the State statutory and/or administrative provisions, as of 1983, appear in Subcommittee Report, Appendix II, at 15-18.

[396] *Ibid.*, at 3.

[397] It will be recalled that this is the sole remaining restriction on political activity imposed by the Hatch Act on federally funded State and local employees: see *supra*, this ch., sec. 4(a)(iii)b.(1).

[398] Removed by Alabama, Arkansas, Nebraska, and North Dakota; retained by Alaska, Arizona, Connecticut, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maine, New Hampshire, New Mexico, Ohio, Oklahoma, Rhode Island, Texas, Vermont, Virginia, Washington, and West Virginia: Subcommittee Report, *supra*, note 395, at 3.

(2) a prohibition against becoming a candidate in a nonpartisan election was removed by five states while being retained by thirteen states;[399]

(3) a prohibition against holding office in a political party, organization, or club was removed by nine states, while being retained by thirteen states;[400]

(4) a prohibition against taking an active part in the management of a political club, organization, party or campaign was removed by ten states, while being retained by twelve states;[401]

(5) a prohibition against becoming a candidate for or serving as a delegate, alternate or proxy at a political party convention was removed by six states, while being retained by three states;[402]

(6) a prohibition against working as a volunteer for partisan candidates, campaign committees or political parties was removed by six states, while being retained by six states;[403]

(7) a prohibition against soliciting or collecting political contributions was removed by six states, while being retained by thirteen states;[404]

(8) a prohibition against campaigning for candidates in a partisan election was removed by seven states, while being retained by six states;[405] and

(9) a prohibition against attending political meetings or rallies or serving

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[399] Removed by Alabama, Arkansas, Kansas, Nebraska, and North Dakota; retained by Alaska, Arizona, Florida, Georgia, Indiana, Kentucky, Louisiana, New Hampshire, New Mexico, Ohio, Oklahoma, Rhode Island, and West Virginia: *ibid.*

[400] Removed by Alabama, Arkansas, Connecticut, Florida, Maine, Michigan, North Dakota, Texas, and Utah; retained by Alaska, Arizona, Georgia, Kentucky, Louisiana, Missouri, Nebraska, New Mexico, Ohio, Oklahoma, Pennsylvania, Washington, and West Virginia: *ibid.*, at 4.

[401] Removed by Alabama, Arkansas, Connecticut, Maine, Montana, Nebraska, New Hampshire, North Dakota, Tennessee, and Texas; retained by Alaska, Arizona, Georgia, Idaho, Kentucky, Louisiana, Missouri, North Carolina, Ohio, Oklahoma, Pennsylvania, and West Virginia: *ibid.*, at 5.

[402] Removed by Alabama, Arkansas, Connecticut, Maine, Michigan, and Texas; retained by Arizona, Ohio, and Pennsylvania: *ibid.*, at 6.

[403] Removed by Alabama, Arkansas, Connecticut, Maine, North Dakota, and Texas; retained by Arizona, Illinois, Louisiana, Mississippi, Ohio and Pennsylvania: *ibid.*

[404] Removed by Alabama, Arkansas, Connecticut, Michigan, North Dakota, and Texas; retained by Arizona, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Mississippi, Ohio, Oklahoma, Rhode Island, and Tennessee: *ibid.*

[405] Removed by Alabama, Arkansas, Connecticut, Maine, Montana, North Dakota, and Texas; retained by Arizona, Georgia, Illinois, Louisiana, Mississippi, and Ohio: *ibid.*

on committees that organize activities of political campaigns was removed by six states, while being retained by three states.[406]

Having identified these changes in state restrictions, the Subcommittee turned to consider their effect. It was acknowledged that, although the restrictions against voluntary political activity had been largely removed, provisions designed to protect employees, similar to those contained in the Hatch Act, still remained.[407] Based upon information received from state officials, the Subcommittee concluded that "[a]side from an increase in political activity, no other effects were noted by officials we contacted, including any increase in the improper use of authority and coercive tactics by public employees".[408]

(iv) Reform of the Hatch Act

a. Arguments Against Reform

Supporters of the Hatch Act typically advance a number of arguments in its favour. Among them are said to be defences of the Act "as an antidote to biased administration and, paradoxically, as a guardian of public employees' political freedoms".[409]

Perhaps the argument most often made in defence of the Act derives from the notion that "the freer the employees are to engage in *voluntary* political activity, the greater is the possibility that they will be coerced into *involuntary* political activity".[410] By proscribing partisan political activity on the part of public employees, the opportunity to coerce such employees into involuntary political activity is necessarily eliminated. The Act, defenders suggest, provides public employees with an absolute defence to any attempt to coerce political behaviour: the ability to respond "I'm Hatched". Public employees are thus free to engage in permitted (essentially nonpartisan) political activities in accordance with the dictates of their own conscience, rather than in accordance with the dictates of their superiors. Defenders of the Hatch Act argue that the only reliable method of protecting employees from the coercion of superiors is to proscribe voluntary partisan political activity. They assert that a prohibition directed exclusively at coercive behaviour, behaviour that may be very subtle indeed, would be wholly inadequate; employees would be denied the ability to use the Act as a defence. They argue, therefore, that coercion can only be effectively eliminated by prohibiting both the activity sought to be coerced, as well as the coercion itself.[411]

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[406] Removed by Alabama, Arkansas, Connecticut, Maine, Montana, and Texas; retained by Arizona, Illinois, and Ohio: *ibid.*, at 7.

[407] *Ibid.*, at 8.

[408] *Ibid.*

[409] Developments in the Law, *supra*, note 382, at 1651.

[410] Bolton, *The Hatch Act: A Civil Libertarian Defense* (American Enterprise Institute for Public Policy Research, 1976), at 13 (emphasis added).

[411] See, for example, Hatch Act Revision, *supra*, note 342, at 15-17, and Vaughn, *supra*, note 337, at 530. An interesting discussion of the arguments in support of the Hatch Act

Coercion by government supervisors is not the only concern of those who support the Hatch Act. Public employee unions have been said to pose a similar risk:[412]

> Indeed, the difference between coercion of an employee by a supervisor (the paradigm of 1939) and coercion of an employee by a union — which may include supervisors — (the paradigm of today) is that coercion by a union is far harder to resist. Moreover, it may well be that unions are far more capable of engaging in the systematic solicitation and intimidation of federal employees than a network of supervisors.... Union protestations that their presence renders supervisor coercion less likely, however accurate, still provide no answer to the question of what renders union coercion less likely.

Nor does the need for protection from political coercion end with government employees. Governmental authority may be used to coerce political conduct not only by employees, but also by members of the public.[413] Accordingly, the proscription of political activity protects against coercion directed against members of the public as well.

A further argument often advanced in support of the Act is that it is necessary to restrict voluntary political activity in order to maintain the efficiency and professionalism of the federal bureaucracy, and the faith and confidence of the public in the government.[414] As a corollary, it is asserted that the impartiality of the public service, promoted by the prohibition against

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may be found in Bolton, *supra*, note 410. As the title would suggest, the author argues that a civil libertarian defence of the Hatch Act ought to be made. He suggests that the arguments made most often in support of the Act are ordinarily the least satisfactory. Stating that "the Hatch Act is, in effect, a case of the government restraining itself", the thesis of the paper is illustrated by the following passage (at 3):

> The most acute government responsibility is that government not allow itself to be used to skew the political process. The political debate can never be 'uninhibited, robust, and wide-open' if government employees can coerce their colleagues or intimidate the general public. When viewed as an inhibitor imposed on the government itself, the Hatch Act is as justifiable as other restrictions — judicially or legislatively created — that prevent the government from regulating the 'free market' of ideas.

[412] *Ibid.*, at 14-15.

[413] Vaughn, *supra*, note 337, at 549.

[414] See, for example, *ibid.*, at 530. One commentator has suggested that it is not possible to defend the Act adequately on this basis: see Bolton, *supra*, note 410, at 6-9. The author argues that if the "efficiency and professionalism" defence refers to the productivity of the federal bureaucracy, then the broad prohibitions in the Hatch Act are unnecessary. For example, if political activities during working hours adversely affected productivity, then adequate protection is provided by restrictions forbidding such activity during working hours. On the other hand, if the "efficiency and professionalism" defence refers to the appearance of a nonpartisan professional bureaucracy, then again the argument is unpersuasive. In this case it "verges on asserting that it is aesthetically unpleasing to see civil servants involved in partisan campaigns". *Ibid.*, at 9.

political activity, ensures that government programmes are administered as required by law, rather than in accordance with partisan political objectives.[415]

Finally, those in favour of the Hatch Act assert that repeal of the Act would inevitably lead to the creation of "powerful political machines built upon the power wielded by public employees".[416]

b. Arguments For Reform

With particular reference to the Hatch Act's incorporation of the more than 3,000 Civil Service Commission rulings, the arguments made in favour of reforming the Act often call into question its constitutional validity, claiming that it is vague and overbroad, infringing upon First Amendment freedoms. A former member of the Commission on Political Activity of Government Personnel[417] offered the following summary of one of the Commission's conclusions: "[t]he present federal Hatch Act is confusing, ambiguous, restrictive, negative in character, and possibly unconstitutional".[418] It will be recalled that in 1973 the United States Supreme Court refused to hold the Hatch Act unconstitutional as being overbroad and vague by reason of its incorporation of the pre-1940 rulings.[419] Nevertheless, in 1975, in connection with one of the many legislative attempts to amend the Hatch Act, it was said that "[e]xisting law which actually incorporates over 3,000 administrative determinations, is vague, overly broad, and infringes upon the right of every American to participate fully and completely in the political life of this Nation".[420] Similarly, based upon evidence received at public hearings held in 1975, it was stated that "[t]he overwhelming sentiment which surfaced during these hearings was that the Hatch Act was overly broad, vague, and repressive in nature, and that it infringed upon the constitutionally guaranteed rights of free speech and free association".[421] It would seem, therefore, that those who argue for reform of the Hatch Act continue to question the Act's constitutional validity, notwithstanding the decision of the United States Supreme Court in *Letter Carriers*.[422]

Supporters of reform also cite the chilling effect produced by the vagueness of the Act's proscriptions. Uncertainty in distinguishing between those activities that are permitted and those activities that are prohibited results in employees being overly cautious in their political behaviour, thereby discouraging even legitimate activity.[423]

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[415] See Vaughn, *supra*, note 337, at 539.

[416] *Ibid.*, at 530. See, also, Hatch Act Revision, *supra*, note 342, at 18.

[417] Discussed *infra*, this ch., sec. 4(a)(iv)c.

[418] Jones, "Reevaluating the Hatch Act: A Report On the Commission on Political Activity of Government Personnel" (1969), 29 Pub. Admin. Rev. 249, at 252.

[419] *United States Civil Service Commission v. National Association of Letter Carriers*, *supra*, note 370. For a discussion of this case, see *supra*, this ch., sec. 4(a)(ii).

[420] House Report, *supra*, note 342, at 64.

[421] *Ibid.*, at 74.

[422] *Supra*, note 370.

Finally, those in favour of reform reject the validity of the arguments made in support of the Hatch Act. While denying that the possibility of coercion poses any real problem in fact, they argue that if coercion of public employees is indeed the risk addressed by the Hatch Act, then provisions specifically directed at coercion ought to be enacted. Similarly, if political corruption is the risk, then provisions ought to be enacted proscribing specifically objectionable behaviour. In response to the argument that the ban on voluntary political activity is required in order to maintain a professional and efficient bureaucracy, those in favour of reform point to the merit system and deny that it will be jeopardized by such political activity.

c. Commission on Political Activity of Government Personnel

Congress established by statute the Commission on Political Activity of Government Personnel in October 1966, to "make a full and complete investigation and study of the Federal laws which limit or discourage the participation of Federal or State officers and employees in political activity with a view to determining the effect of such laws, the need for their revision or elimination, and an appraisal of the extent to which undesirable results might accrue from their repeal".[424] The task of the Commission was to reconcile two fundamental, but nevertheless competing principles: (1) the importance, in a democratic society, of encouraging the participation of as many citizens as possible in the political process; and (2) the importance of ensuring integrity in the administration of governmental affairs and the development of a politically free civil service.[425] In attempting to reconcile these principles, the Commission was mindful of the fact that any restrictions placed upon the political activities of civil servants must be consistent with the constitutionally guaranteed freedoms of speech and association. The Commission also recognized that it is essential to protect government employees from coercion.[426] In its 1968 Report, the Commission summarized its conclusions as follows:[427]

> [T]he best protection that the government can provide for its personnel is to prohibit those activities that tend to corrode a career system based on merit. This requires strong sanctions against coercion. It also requires some limits on the role of the government employee in politics. It was the unanimous view of the Commission members, however, that these limits should be clearly and specifically expressed, and that beyond those limits political participation should be permitted as fully as for all other citizens.

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[423] See, for example, Hatch Act Revision, *supra*, note 342, at 12, and Vaughn, *supra*, note 337, at 530.

[424] Pub. L. 89-617, 80 Stat. 868, as am. by Pub. L. 90-55, 81 Stat. 124.

[425] Commission Report, *supra*, note 342, at 3.

[426] *Ibid.*

[427] *Ibid.*, at 3-4.

....

> The basic thrust of the Commission's proposal is to expand, within limits, the area of political activity permitted for Federal employees, and to expand even more the area of such activity permitted under Federal law for State and local employees administering the ever-increasing number of programs financed by Federal funds, while strengthening the sanctions at all levels of government against coercion and misuse of official position.

The recommendations of the Commission were embodied in a Draft Bill submitted as part of its Report.[428] The Bill, unlike the Hatch Act, specifically details what activities are permitted and what activities are prohibited.

The Draft Bill would specifically permit federal employees to join a political party or other party organization and, while not on duty, to participate actively in its affairs, except by serving as an officer.[429] It was suggested that "active" participation in the affairs of a political party would permit an employee, for example, to make motions, prepare resolutions and serve on committees.[430] The question whether federal employees should be allowed to serve as officers in political organizations proved to be an area of considerable disagreement for the members of the Commission. They were unanimously agreed that federal employees should be barred from such positions as chairman, vice chairman and treasurer of any national political party. A substantial majority were of the opinion that the prohibition should extend to similar state and county political offices. The members were evenly divided on the question whether a federal employee should hold the post of ward or precinct committeeman.[431]

In addition to the right to join a political party and to participate actively in its affairs, the Draft Bill specifically would permit federal employees to do the following: (1) register and vote in any election; (2) express opinions freely in public or in private on any political subject or candidate; (3) contribute money voluntarily for political purposes; and (4) serve as a delegate to a political or constitutional convention, provided such service would not interfere with the time and attention required at official duties.[432]

Federal employees would be specifically prohibited from: (1) soliciting funds for political purposes; (2) engaging in political activity while on duty, while in uniform, or while on government premises; (3) becoming a candidate or campaigning for or holding any federal or state elective office; (4) acting at any polling place as an official recorder, checker, watcher, or challenger, of any political party; (5) serving in a political organization as an officer; and (6) managing a campaign for any candidate for any federal or state elective office.[433]

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[428] *Ibid.*, at 44-60.

[429] *Ibid.*, at 46, Draft Bill, § 1621(a)(3).

[430] *Ibid.*, at 40.

[431] *Ibid.*, at 6.

[432] *Ibid.*, at 46, Draft Bill, § 1621(a)(1), (2), (4) and (6).

With respect to local and municipal political activity, the Draft Bill would eliminate the current notion of "nonpartisan elections". An employee would be prohibited from becoming a candidate or campaigning for or holding any public office, except a "local office", which is defined to mean "an office in any branch of the government of a political subdivision of a state, the duties of which require less than full-time service, and the compensation of which is nominal".[434] Any federal employee wishing to become a candidate for local office would be required to notify his agency and request permission. The agency head would be required to grant approval unless: (1) the employee would be involved in an actual or apparent conflict of interest; (2) the employee's duties of office would interfere with the time and attention required by his employing agency; (3) the campaign would interfere with the time and attention required by his employing agency; or (4) holding office would conflict with the provisions of any other applicable law or regulation. Once granted, the employee could not campaign while on active duty, but might be granted or required to take a leave of absence.[435]

In addition to enumerating specifically those voluntary political activities that are permitted and those that are prohibited, the Draft Bill includes very stringent provisions directed against coercion and abuse of official authority.[436]

Finally, the Commission recommended that the Civil Service Commission be given the discretion to assess the appropriate penalty in the event of breach, ranging from a reprimand to removal.[437]

d. Legislative Attempts at Reform

To date, the most successful attempt by Congress to act upon the recommendations of the Commission on Political Activity of Government Personnel came during the 94th Congress, when both houses approved H.R. 8617, the Federal Employees' Political Activities Act of 1976. The Bill would have accomplished two primary objectives: (1) amendment of the Hatch Act to permit federal employees to engage in voluntary political activities, by removal of the prohibition against taking an active part in political management or in political campaigns;[438] and (2) the prohibition of abuses of authority and coercion of non-voluntary political activity.

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[433] *Ibid.*, at 47-48, Draft Bill, § 1622(c)(1)-(6).

[434] *Ibid.*, at 46 and 48, Draft Bill, §§ 1602(e) and 1622(c)(3)(C).

[435] *Ibid.*, at 48, Draft Bill, § 1623.

[436] *Ibid.*, at 46-47, Draft Bill, § 1622(a) and (b).

[437] *Ibid.*, at 49, Draft Bill, § 1624.

[438] The Bill would have reenacted Subchapter III of Chapter 73 of 5 U.S.C. Section 7325, as reenacted, would have retained the prohibition against taking an active part in political

The Federal Employees' Political Activities Act of 1976 was forwarded to President Ford, who vetoed the Bill on April 12, 1976, saying:[439]

> If, as contemplated by H.R. 8617, the prohibitions against political campaigning were removed, we would be endangering the entire concept of employee independence and freedom from coercion which has been largely successful in preventing undue political influence in Government programs or personnel management. If this bill were to become law, I believe pressures could be brought to bear on Federal employees in extremely subtle ways beyond the reach of any anti-coercion statute so that they would inevitably feel compelled to engage in partisan political activity. This would be bad for the employee, bad for the government, and bad for the public.
>
> ....
>
> The Hatch Act is intended to strike a delicate balance between fair and effective government and the First Amendment rights of individual employees. It has been successful, in my opinion, in striking that balance.

It has been noted that, from 1975 to 1984, thirty-three bills have been introduced to amend the Hatch Act, all of which have failed.[440] The controversy surrounding the Hatch Act apparently has not ended.

(b) THE DUTIES OF LOYALTY AND CONFIDENTIALITY

(i) Introduction

Although, as we have discussed, the Hatch Act, and its counterparts at the state level, do not prohibit public employees in the United States from speaking out on political matters, those employees are nevertheless subject to various constraints with respect to public comment and disclosure of information acquired during the course of employment. While public employees, as citizens, are entitled, and even encouraged, to speak out on matters of public concern, their speech is subject to certain limits imposed by the duties of loyalty and confidentiality owed to the State as employer.

The duties of loyalty and confidentiality to which public employees in the United States are subject are governed by an amalgam of general principles of employment law and statutory provisions. Nevertheless, as we shall see, United States law recognizes certain exceptions to the duties of loyalty and confidentiality, in the case of comment on a matter of public concern, and disclosure of information evidencing employer wrongdoing where such disclosure is in the public interest.

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management or political campaigns for certain employees of the Internal Revenue Service, the Department of Justice and the Central Intelligence Agency.

[439] H.R. Doc. No. 449, 94th Cong., 2d Sess. (1976), reprinted in Documentary Background, *supra*, note 342, 571, at 572-73.

[440] Developments in the Law, *supra*, note 382, at 1652, *n*. 12, citing *Washington Post*, Washington (April 17, 1984), at A19. For a brief history and a chronology of these events, see Schwemle and McMurtry, "Hatch Act: Proposed Amendments" (Issue Brief, Congressional Research Service, 1984).

(ii) General Employment Law Principles

a. *Common Law*

In the United States, at common law, it is an implied term of every contract of employment that an employee owes his or her employer a duty of loyalty and good faith.[441] Included in the duty of loyalty and good faith is the general notion of trustworthiness, which requires employees to conduct themselves in the course of employment in the employer's best interest.[442]

The duty of an employee to maintain confidentiality with respect to information that he or she knows, or ought to know, is confidential constitutes one aspect of the broader duty of loyalty and good faith.[443] The question whether information imparted to an employee is of a confidential nature is one of fact that must be established by all the circumstances surrounding the employment.[444]

The terms of the employment relationship, including the duties of loyalty and confidentiality, may also be expressly established in the form of employment manuals, codes of conduct, or internal policy directives. In public employment, such manuals, codes or directives may have statutory or regulatory force. They nevertheless serve the same purpose in the context of public employment as they do in private employment; that is, they specify the terms upon which employment is granted. These codes or employment manuals often expressly address such matters as confidentiality and disclosure of information.[445]

The terms of the employment relationship, including the scope and content of the duties of loyalty and confidentiality, may also be established by a formal written contract.[446] For example, a private employer might require that a prospective employee enter into a secrecy agreement with respect to trade secrets, in order to prevent the employee from using specific confidential information obtained in the course of employment after he or she leaves the employment relationship.[447]

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[441] See, generally, 56 C.J.S. *Master and Servant* (hereinafter referred to as "C.J.S."), §§ 66-74.

[442] American Law Institute, *Restatement of the Law, Second - Agency 2d* (1958) (hereinafter referred to as "Second Restatement"), § 387.

[443] *Ibid.*, § 395.

[444] C.J.S., *supra*, note 441, § 72.

[445] For example, the manual of conduct of a police department will typically provide:

> CONFIDENTIAL INFORMATION. Members and employees of the Department shall treat as confidential the official business of the Department. They shall not impart it to anyone except those with an official need to know, or as directed by their commanding officer, or under due process of law; and they shall not make known to any persons, whether or not a member or an employee of the Department, any special order which they may receive, unless required by the nature of the order. The Chief of Police shall establish policies concerning dissemination of information to representatives of the media.

See *O'Brien v. Town of Caledonia*, 748 F. 2d 403 (7th Cir. 1984), at 405, where the cited clause was held to be constitutionally valid.

[446] C.J.S., *supra*, note 441, § 72, and Second Restatement, *supra*, note 442, § 395.

The federal government in the United States has occasionally required a prospective employee of the intelligence or defence services to enter into a secrecy agreement, whereby the employee agrees not to disclose or publish any information or material obtained during the course of his employment without prior approval of the employer.[448] Breach of such an agreement by the employee can be grounds for an action by the government to enjoin publication of such material and for damages for breach of contract.[449]

b. Legislative Provisions Governing Loyalty and Confidentiality

Public employees may also be subject to statutory or regulatory provisions that impose duties of loyalty and confidentiality. For example, public employers may impose a statutory requirement that an employee take an oath of loyalty, subject to certain constitutional considerations.[450]

Federal public employees are subject to regulations that establish, among other matters,[451] conflict of interest guidelines prohibiting the use of public information by public employees in their private interest, where such information has not been made generally available to the public.[452]

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[447] *Ibid.*

[448] See the following cases involving former C.I.A. agents: *United States v. Marchetti*, 466 F. 2d 1309 (4th Cir. 1972), which sets out the secrecy agreement at 1312; *Snepp v. United States*, 444 U.S. 507, 100 S.Ct. 763 (1980); and *McGehee v. Casey*, 718 F. 2d 1137 (D.C.Cir. 1983).

[449] *Snepp v. United States*, *supra*, note 448. To date, these secrecy agreements have generally only been required of personnel in the intelligence or defence services. However, in 1983 President Reagan issued National Security Decision Directive No. 84 (March 11, 1983), which would have extended the requirement of a prepublication review or a secrecy agreement as a condition of employment for the entire executive branch. The Directive was met with extensive public and congressional criticism, and was temporarily suspended in 1984. It has not been reimplemented to date. See discussion in Cheh, "Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information" (1984), 69 Cornell L. Rev. 690. Such agreements are subject to constitutional scrutiny: see discussion *infra*, this ch., sec. 4(b)(iii).

[450] Such oaths are subject to constitutional scrutiny for vagueness and overbreadth. See discussion *infra*, this ch., sec. 4(b)(iii). The federal government has also required members of intelligence and defence agencies to take an oath of secrecy prior to their departure from government service. The legal force of such oaths has been doubted, on both constitutional and contractual grounds, by the United States Court of Appeals, Fourth Circuit, in *United States v. Marchetti*, *supra*, note 448, at 1317.

[451] As we have discussed, codes of conduct and employment manuals imposing duties of loyalty and confidentiality may also be established by statute or regulation: *supra*, this ch., sec. 4(b)(ii)a.

Public employees may also be subject to specific statutory duties and limitations with respect to information to which they have access in the course of their employment. Numerous federal and state laws contain statutory non-disclosure provisions, similar to those found in Ontario statutes,[453] that prohibit the unauthorized release by public employees of various kinds of information obtained in the course of their employment. These provisions generally provide express sanctions for the disclosure or use of confidential information, including fines, imprisonment and dismissal from employment.

Examples of such statutory prohibitions against disclosure of information are found in laws governing trade secrets,[454] national defence and intelligence services,[455] income tax information[456] and bank records.[457]

The duty of confidentiality of public employees may also be established by freedom of information laws governing disclosure of information to the public, which have been passed in the United States by the federal government[458] and by forty-eight of the fifty American states.[459] Freedom of information statutes generally favour broad public access to government information, subject to specific exemptions. A public employee may, therefore, be under an obligation to maintain confidentiality with respect to such exempted information. For example, under the federal Freedom of Information Act[460] (FOIA), an agency may exempt various kinds of information from public access. These exemptions include records relating to national defence and foreign policy,[461] trade secrets and commercial information,[462] and matters relating to personal privacy[463] and law enforcement.[464]

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[452] See 5 C.F.R. § 735(B) and (C). The regulations do not otherwise address the issue of disclosure of information or confidentiality. These matters are governed generally by the federal Freedom of Information Act, 5 U.S.C. § 552 (1982) (hereinafter referred to as "FOIA"), discussed *infra*, this sec.

[453] See discussion *supra*, ch. 3, sec. 3(b)(i)a.(2).

[454] A typical example of such non-disclosure provisions is the prohibition of disclosure of trade secrets established in 18 U.S.C. § 1905 (1982), which provides as follows:

> Whoever, being an officer or employee of the United States ... publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by ... such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person ... or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office of employment.

[455] 50 U.S.C. § 421 (1982).

[456] 26 U.S.C. § 6103 (1982).

[457] 18 U.S.C. § 1906 (1982).

[458] FOIA, *supra*, note 452.

[459] See discussion in Ontario, *The Report of the Commission on Freedom of Information and Individual Privacy: Public Government for Private People* (1980), Vol. 2, at 123, citing McClain (ed.), *A Summary of Freedom of Information and Privacy Laws of the 50 States* (1978).

FOIA also allows an agency to exempt information that is specifically subject to a statutory non-disclosure provision, such as those described above, if the statute either (a) "requires that the matters be withheld from the public in such a manner as to leave no discretion", or (b) "establishes particular criteria for withholding or refers to particular types of matters to be withheld".[465]

All of the exemptions in FOIA are at the discretion of the agency. The Act does not specify which person within the agency is authorized to determine what information is exempt; rather, the administration of FOIA, including the delegation of the power to make a determination that certain information is exempt, is left to the individual agency. We are advised that, as a practical matter, some agencies appoint a person, or persons, to consider requests from the public for information and to determine what records should be withheld from disclosure.

Unlike the statutory non-disclosure provisions described above, FOIA does not provide any sanction for unauthorized disclosure of exempted information by public employees. Rather, where an agency has established procedures for processing FOIA requests, or has specified that certain information should not be disclosed, and a public employee either circumvents the established procedure or discloses information that has been determined to be exempt, that employee may be subject to discipline as a matter of ordinary personnel practice, based on allegations of breach of confidentiality, loyalty, insubordination, or even lack of judgment reflecting on the employee's general competence.[466]

c. *Consequences of a Breach of Loyalty or Confidentiality*

The implications for the employment relationship of a breach of the duties of loyalty and confidentiality depend on the terms of the employment contract.

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[460] FOIA, *supra*, note 452.

[461] *Ibid.*, § 552(b)(1).

[462] *Ibid.*, § 552(b)(4).

[463] *Ibid.*, § 552(b)(6).

[464] *Ibid.*, § 552(b)(7).

[465] *Ibid.*, § 552(b)(3).

[466] It is perhaps more indicative of the underlying policy of broad public access to government records that FOIA provides a sanction for improper, capricious or arbitrary withholding of information: see *ibid.*, § 552(a)(4)(F).

As a general rule, in the United States, in the absence of an agreement to the contrary, employment for an indefinite term is "at will", that is, an employer is entitled to discharge an employee without notice and without cause.[467] Accordingly, an employer who believes that an at-will employee has breached his duty of loyalty or confidentiality can discharge the employee immediately, and the employee has no legal recourse for such discharge.

The strict application of the employment-at-will doctrine has, however, been modified in a number of ways. The employment contract may provide expressly that discharge must be for cause. Labour union collective agreements almost invariably provide that an employer's right to discipline or discharge an employee is limited to circumstances of cause or "just cause".

The employment-at-will doctrine has been modified with respect to public employment by the implementation of civil service laws at both the federal and state level.[468] As we have discussed,[469] these laws were intended to replace the "spoils" system, based on political patronage, with a merit system designed to promote the public interest in the continuity and efficiency of the public service. In order that public employment is not dependent on arbitrary or political motivations, discharge of public employees must be for cause.[470]

As a general rule, under a collective agreement, an employee who has been disciplined or discharged is entitled to file a grievance, and the onus is usually on the employer to establish cause for dismissal. Cause warranting discharge can include such matters as lack of trustworthiness or loyalty, insubordination or incompetence. The nature and content of the duty is a question of fact in each case.

Like unionized employees,[471] public employees who are disciplined or discharged are entitled to dispute the employer's actions through some form of administrative procedure.[472] For example, federal public employees who are subject to serious discipline, such as demotion or discharge, are entitled to apply to the Merit Systems Protection Board,[473] established pursuant to the Civil Service Reform Act of 1978,[474] to dispute the employer's action.[475]

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[467] Kauff and Weintraub, "Recent Developments in the Law of Unjust Dismissal, 1983-84", in Ross (ed.), *Thirteenth Annual Institute on Employment Law: Litigation and Administrative Practice Series No. 258* (1985) 153 (hereinafter referred to as "Developments"), at 154.

[468] See, generally, 67 C.J.S. *Officers* §§ 117-26.

[469] *Supra*, this ch., sec. 4(a)(i).

[470] The Civil Service Reform Act of 1978, 5 U.S.C. § 7513(a) (1982), permits the removal of federal public employees "only for such cause as will promote the efficiency of the service." The provisions of the Act are codified in various sections of 5 U.S.C., to which subsequent references will be made.

[471] Many public employees are unionized and would, therefore, have recourse to procedures established pursuant to their collective agreements.

[472] *Supra*, note 468, §§ 145-74.

The American common law arbitral jurisprudence clearly indicates that an employee's breach of the duty of loyalty may constitute just cause for discharge. In *National Labor Relations Board v. Local Union No. 1229, International Brotherhood of Electrical Workers*,[476] the United States Supreme Court stated that "there is no more elemental cause for discharge of an employee than disloyalty to his employer".[477] This principle was reiterated in *In re Los Angeles Herald-Examiner and Los Angeles Newspaper Guild*,[478] where, in upholding the discharge of an employee who had given information to his employer's competitor, the arbitrator stated:

> As part of the complex of rights and duties comprising the employment relationship, the duty of loyalty of an employee to an employer must certainly be reckoned as an important aspect of the common enterprise.

Another arbitrator has stated the principle in the form of a question:[479]

> It seems natural to pose an age-old question, which has a common denominator with the instant issue: Can you bite the hand that feeds you, and insist on staying for future banquets?

However, not every breach of the duties of loyalty and confidentiality will constitute grounds for discharge. Some breaches will be more serious than others. General principles of labour law require that the severity of the discipline be commensurate with the cause.

(iii) Constitutional Considerations

As we have discussed in the context of political activity by public employees, the right of a public employer to establish terms of public employment is subject to the protections provided to the employee, as citizen, by the Constitution, particularly the First Amendment protection of freedom of speech.

In the United States it has been clearly established that the State cannot condition public employment on terms that infringe an employee's constitutionally protected interest in freedom of expression. In 1967, in *Keyishian v. Board*

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[473] 5 U.S.C. § 7701.

[474] *Ibid.*, § 1205.

[475] *Ibid.*, § 7701.

[476] 346 U.S. 464, 74 S.Ct. 172 (1953) (subsequent reference is to 346 U.S.).

[477] *Ibid.*, at 472.

[478] 49 LA 453 (1967), at 464.

[479] *In re Forest City Publishing Co.*, 58 LA 773 (1972), at 783.

of Regents,[480] the United States Supreme Court firmly reversed an earlier decision of that Court wherein it had been stated:[481]

> The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied term of the contract. The servant cannot complain as he takes the employment on the terms which are offered to him.

In *Keyishian*, Brennan J. held that the theory that public employment that may be denied altogether may be made subject to any condition, regardless of how unreasonable, had been rejected. He observed that it was "too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."[482]

This general principle was refined one year later in *Pickering v. Board of Education*.[483] Pickering had been dismissed from his position as a teacher for having written a letter to a newspaper criticizing the Board of Education regarding its allocation of school funds and its method of informing taxpayers of the need for further funding. At a hearing by the Board, it was determined that some of the statements made in the letter were false. The Board held that the publication of the letter was detrimental to the efficient operation and administration of the schools of the district and that the interests of the schools required Pickering's dismissal. The Supreme Court of Illinois upheld the dismissal on the ground that, as a teacher, Pickering was required to refrain from making statements about the schools' operations, although in his capacity as a citizen, rather than a teacher, he had an undoubted right to engage in such comment.[484]

The United States Supreme Court reversed the dismissal. The Court affirmed its decision in *Keyishian* by stating that teachers may not, merely because of their public employment, be compelled to relinquish First Amendment rights that they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work. The Court nevertheless acknowledged the interest of the State, as an *employer*, in regulating the speech of its employees, and stated:[485]

> The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

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[480] 385 U.S. 589, 87 S.Ct. 675 (1967) (subsequent reference is to 385 U.S.).

[481] *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, at 217, 29 N.E. 517, at 518 (U.S.S.C. 1892).

[482] *Supra*, note 480, at 605-06.

[483] 391 U.S. 563, 88 S.Ct. 1731 (1968) (subsequent references are to 391 U.S.).

[484] 36 Ill. 2d 568, 225 N.E. 2d 1 (1968).

[485] *Supra*, note 483, at 568.

Having articulated this requirement of balancing in each case, the Court observed that it would be neither appropriate nor feasible to attempt to lay down any general standard against which all statements by public employees may be judged. Nevertheless, the Court did indicate a number of significant factors that should be weighed when balancing the respective interests.

The first factor referred to by the Court was the nature of the relationship between the employee and the person criticized, that is, whether the employee's comment seriously affected either discipline or harmony in the workplace, or indicated an actual or potential breach of the employee's duty of loyalty or confidentiality. A second major factor was the nature of the comment itself, and particularly whether the comment related to a matter of legitimate public concern requiring free and open debate; the more important the issue to the public, the greater the public interest in allowing comment. Indeed, the Court indicated that where the employee making the comment is, as a result of his employment, more likely to have an informed and definite opinion than the average citizen on the matter of public interest, it is essential that he be encouraged to participate in the public debate rather than prohibited from doing so. The Court observed:[486]

> Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

The Court recognized that statements by a public employee may be accorded greater weight because of a presumption that the employee possesses greater knowledge or information as a result of his employment. Presumably, therefore, an employee will be expected to be diligent in ensuring that statements made are correct. However, the Court indicated that the fact that a statement by a public employee was incorrect will not necessarily be fatal to the protection of the employee's speech, if the statement was based on information that was in the public domain and, therefore, capable of being rebutted by the employer. The fact that a statement was incorrect may, however, indicate a general lack of competence on the part of the employee in fulfilling his or her employment duties.

The Court concluded that in a case such as *Pickering*, "in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher", the balance weighed in favour of freedom of speech of the employee as citizen.[487]

The Court in *Pickering* clearly acknowledged that loyalty and confidentiality are among the duties that a public employee owes to his or her employer. Although finding as a matter of fact that Pickering's relationship with his employer was not of such a close nature that personal loyalty and confidence were necessary, Marshall J. observed:[488]

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[486] *Ibid.*, at 572.

[487] *Ibid.*, at 574.

> It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined. We intimate no views as to how we would resolve any specific instances of such situations, but merely note that significantly different considerations would be involved in such cases.

The general guidelines and factors outlined in *Pickering* have been followed and applied in numerous decisions of American courts at both the federal and state level.[489] However, as the Court in *Pickering* predicted, the factual situations in these subsequent cases have been so varied as to offer little clarification concerning where the balance will lie in any particular instance. In *Connick v. Myers*,[490] the United States Supreme Court more fully elaborated the *nature* of the comment that would attract constitutional protection.

Myers was an assistant district attorney who had responded to a proposed transfer by distributing a questionnaire soliciting her colleagues' views concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors and perceived pressure to work in electoral campaigns.[491] Connick, the District Attorney, fired Myers for insubordination.

In a 5-4 decision, the majority of the Court held that the First Amendment protections articulated in *Pickering* apply only to speech on matters of public concern. The Court indicated that where a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of personal interest, it will not review the wisdom of what is, in effect, a personnel decision. The question whether an employee's speech addresses a matter of public concern must be determined by "the content, form and context" of the statement.[492]

The Court clearly indicated that if Myers' questionnaire had not raised the issue of perceived pressure by superiors to participate in electoral campaigns, her claim would have been considered to be based solely on personal comment and, therefore, not reviewable on constitutional grounds. However, having found that this one issue was a matter of public concern, the Court proceeded to apply the *Pickering* balancing test. The Court found that Myers' questionnaire had touched upon matters of public concern in only a very limited sense, while her conduct had seriously interfered with close working relationships and had undermined the authority of her supervisor. Myers' dismissal was upheld.

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[488] *Ibid.*, at 570, *n*. 3.

[489] *O'Brien v. Town of Caledonia*, *supra*, note 445; *Williams v. Board of Regents of the University System of Georgia*, 629 F. 2d 993 (5th Cir. 1980); *Porter v. Califano*, 592 F. 2d 770 (5th Cir. 1979); *Rozier v. St. Mary's Hospital*, 88 Ill. App. 3d 994, 411 N.E. 2d 50 (1980); *California School Emp. Ass'n v. Foothill Community College Dist. of Santa Clara*, 52 Cal. App. 3d 150, 124 Cal. Rptr. 830 (1975); and *Sponich v. City of Detroit Police Dept.*, 49 Mich. App. 162, 211 N.W. 2d 674 (1973).

[490] 461 U.S. 138, 103 S. Ct. 1684 (1983) (subsequent references are to 103 S.Ct.).

[491] *Ibid.*, at 1686-87. The questionnaire is reproduced as an appendix to the decision.

[492] *Ibid.*, at 1690.

In a dissenting judgment, Brennan J. espoused a broader view of the concept of "public concern". In his view, Myers' questionnaire addressed matters of public concern because it discussed subjects that could reasonably be expected to be of interest to persons seeking to develop informed opinions about the manner in which an elected official charged with managing a vital governmental agency discharged his responsibilities. He held, therefore, that Myers' comment warranted constitutional protection.[493]

As a result of Pickering, therefore, a breach of a public employee's duties of loyalty and confidentiality, whether established statutorily, by internal administrative procedures, or simply as a matter of the ordinary employment law, will not necessarily constitute grounds for discipline or dismissal. If the employee can establish that such a breach of confidence occurred as part of a statement relating to a matter of public concern, the courts will inquire whether the employer can "show a state interest in confidentiality applicable on these facts which outweighs the public and individual interests in the particular statements made".[494]

Nevertheless, at least one federal Court of Appeals, in *Sprague v. Fitzpatrick*,[495] has adopted the position that criticism of, or disclosure of information about, an immediate superior or fellow employee in a confidential or policy-making position makes practically impossible a continued working relationship. An employee might find, therefore, that his or her speech, even regarding matters of significant public concern, was unprotected.[496]

It should be noted that any term of public employment is subject to constitutional scrutiny. For example, we stated earlier that the government, as employer, may attempt to assure itself of the loyalty of its employees by requiring that an oath of loyalty be taken. However, such oaths will be subject to careful scrutiny by the courts to ensure that they do not infringe constitutionally protected rights by vagueness or overbreadth.[497] In *Cole v. Richardson*,[498] the United States Supreme Court considered the development of the American case law relating to oaths of loyalty, and clearly articulated the principle that neither federal nor state governments may condition employment on taking oaths that infringe rights guaranteed by the First and Fourteenth Amendments, and, particularly, on taking an oath that one will not engage in protected speech activities.[499]

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[493] *Ibid.*, at 1698.

[494] *Hanneman v. Breier*, 528 F. 2d 750 (7th Cir. 1976), at 754; see, also, *O'Brien v. Town of Caledonia*, *supra*, note 445, and *United States v. Marchetti*, *supra*, note 448.

[495] 546 F. 2d 560 (3d Cir. 1976).

[496] But compare *Williams v. Board of Regents of the University System of Georgia*, *supra*, note 489, and *Porter v. Califano*, *supra*, note 489.

[497] See, generally, 67 C.J.S. *Officers* § 46.

[498] 405 U.S. 676, at 679, 92 S.Ct. 1332 (1972).

Similarly, the requirement that a prospective employee enter into a secrecy agreement with respect to information obtained during public employment will be subject to First Amendment considerations to ensure that it does not prohibit protected expression.[500]

(iv) Breach of the Duties of Loyalty and Confidentiality in the Public Interest: Whistleblowing

a. Introduction

There has been growing support in the United States for protection of employees who act in the public interest by disclosing conduct of their employers that constitutes a breach of law or regulations, or that is otherwise contrary to public policy. Disclosure of employer wrongdoing by an employee has become known generally as ''whistleblowing''.

Whistleblowing is, by its nature, an act of disloyalty by an employee to an employer, which almost invariably creates disruption and disharmony in the workplace. Whistleblowing may also constitute a breach of the duty of confidentiality, as it may involve the disclosure of confidential information obtained during the course of employment. However, as will be discussed in subsequent sections of this chapter, there are available protections under American law for persons who breach the duties of loyalty and confidentiality by exposing wrongdoing on the part of their employers.

b. Constitutional Protections

A public employee who discloses serious government wrongdoing may derive some protection from employer retaliation by relying on the *Pickering* balancing test, described above,[501] which requires a court to weigh not only the employee's interest, as citizen, in free speech, but also the public interest in such disclosure, against the resulting disruption to the operation and efficiency of the workplace.

However, commentators have suggested that, while *Pickering* might apply to protect disclosure that substantially disrupts the employment relationship, such protection is far from clear, particularly in cases that involve criticism of immediate superiors, or of a fellow employee with whom the whistleblower works in a confidential or policy-making position.[502] This lack of certainty regarding the applicability of constitutional protections in a particular case undoubtedly has a chilling effect on public employees who might otherwise disclose government wrongdoing.

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[499] See, also, the discussion of the oath of secrecy in *United States v. Marchetti*, *supra*, note 448.

[500] *Snepp v. United States*, *supra*, note 448; *United States v. Marchetti*, *supra*, note 448; and *McGehee v. Casey*, *supra*, note 448.

[501] *Supra*, this ch., sec. 4(b)(iii).

c. *Common Law Protections for Whistleblowers*

As we have discussed,[503] "at-will" employees who disclose employer wrongdoing can be discharged immediately and without recourse. Some American courts have come to regard as both harsh and inequitable the discipline or discharge of an employee in retaliation for an action that is supported by public policy. These courts have responded by creating certain exceptions to the employment-at-will doctrine.[504] However, the development of these exceptions, through the judicial recognition of a cause of action for damages for abusive, or retaliatory, discharge, has been extremely haphazard.[505]

A cause of action for retaliatory or abusive discharge has most often been recognized with respect to employer retaliation against employees for the exercise of a statutory right or benefit, such as filing a worker's compensation claim.[506] Courts have also intervened with respect to retaliatory discharge arising from an employee's refusal to participate in a criminal act, such as perjury or price fixing.[507]

Some American courts have been willing to recognize a cause of action for abusive discharge based on more general statements of public policy embodied in legislation, even though an express statutory right or duty is neither created nor imposed upon the employee. For example, in order that the public policy of consumer protection should not be undermined, an employee has been allowed to pursue a claim of abusive discharge for disclosing his employer's violation of a consumer protection statute, although he was under no statutory duty to make such a disclosure.[508] One Court has gone so far as to suggest that public policy constituting grounds for relief might be the subject of judicial definition, and that, in making such a determination, a court might consider "what is right and just and what affects the citizens of the state collectively."[509]

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[502] See discussion of *Sprague v. Fitzpatrick*, *supra*, this ch., sec. 4(b)(iii); see, also, Vaughn, "Statutory Protection of Whistleblowers in the Federal Executive Branch" (1982), 3 U. Ill. L. Rev. 615, at 639.

[503] *Supra*, this ch., sec. 4(b)(ii)c.

[504] For a discussion of the development of the law in this area, see Malin, "Protecting the Whistleblower from Retaliatory Discharge" (1982/83), 16 U. Mich. J. L. Ref. 277, at 278-88, and Developments, *supra*, note 467, at 162-216.

[505] The cause of action is most commonly characterized as a tort. Relief has also occasionally been granted on the basis of a breach of an implied covenant of the employment contract. See *Monge v. Beebe Rubber Co.*, 316 A. 2d 549 (N.H.Sup.Ct. 1974), and *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

[506] *Kelsay v. Motorola, Inc.*, 384 N.E. 2d 353 (Ill. Sup.Ct. 1978), and *Frampton v. Central Indiana Gas Co.*, 297 N.E. 2d 425 (Ind. Sup.Ct. 1973).

[507] *Petermann v. International Brotherhood of Teamsters*, 174 Cal. App. 2d 184, 344 P. 2d 120 (1959), and *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 164 Cal. Rptr. 839 (Cal. Sup.Ct. 1980).

Despite these developments, most courts in the United States have refused to recognize a cause of action for abusive or retaliatory discharge.[510] As a result, employees have been denied recourse for retaliatory discharge in cases that involve such matters as advice to an employer's counsel regarding violations of statutory regulations governing food and drugs,[511] and advice to a corporate officer regarding unsafe products.[512]

The courts' refusal to recognize a cause of action for abusive, or retaliatory, discharge has generally been based on an unwillingness to adopt the role of legislator in determining the appropriate public policy to be applied in a particular instance of disclosure.[513]

It will be recalled that some employees, including unionized employees

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[508] *Harless v. First National Bank*, 246 S.E. 2d 270 (W.Va. Sup.Ct. 1978).

[509] *Palmateer v. International Harvester Company*, 421 N.E. (2d) 876 (Ill. Sup.Ct. 1981), at 878.

[510] For an extensive list of cases in which American courts have refused to recognize such a cause of action, see Malin, *supra*, note 504, at 279, *n*. 7.

[511] *Campbell v. Eli Lilly Co.*, 413 N.E. 2d 1054 (Ind. Ct. App. 1980).

[512] *Geary v. United Steel Corp.*, 319 A. 2d 174 (Penn. Sup. Ct. 1974).

[513] This position has been clearly articulated by the New York Court of Appeals in *Murphy v. American Home Products Corporation*, 448 N.E. 2d 86 (1983). While acknowledging that the employment-at-will doctrine could operate unfairly in cases involving retaliation for actions that might be supported by public policy, the Court observed, at 89-90:

> Those jurisdictions that have modified the traditional at-will rule appear to have been motivated by conclusions that the freedom of contract underpinnings of the rule have become outdated, that individual employees in the modern work force do not have the bargaining power to negotiate security for the jobs on which they have grown to rely, and that the rule yields harsh results for those employees who do not enjoy the benefits of express contractual limitations on the power of dismissal....
>
> Both of these aspects of the issue, involving perception and declaration of relevant public policy ... are best and more appropriately explored and resolved by the legislative branch of our government. The Legislature has infinitely greater resources and procedural means to discern the public will, to examine the variety of pertinent considerations, to elicit the views of the various segments of the community that would be directly affected and in any event critically interested, and to investigate and anticipate the impact of imposition of such liability. Standards should doubtless be established applicable to the multifarious types of employment and the various circumstances of discharge. If the rule of nonliability for termination of at-will employment is to be tempered, it should be accomplished through a principled statutory scheme, adopted after opportunity for public ventilation, rather than in consequence of judicial resolution of the partisan arguments of individual adversarial litigants.

Shortly after the decision of the Court of Appeals in *Murphy*, legislation was passed in and public employees, may only be discharged or disciplined for cause. In determining whether cause exists and the appropriate discipline in the context of whistleblowing, arbitrators have considered a number of factors, including:[514]

(1) The significance of the alleged employer wrongdoing.

(2) The identity of the person to whom the criticism or disclosure was made, that is, whether it was made internally or publicly, to a customer, a public body or enforcement agency.

(3) Whether the criticism or disclosure directly or indirectly caused damage to the business or organization.

(4) Whether internal avenues of redress or correction had been exhausted.

(5) Whether the employee reasonably believed the statements to be true at the time they were made.

(6) Whether the tone or language of the statements were malicious, inflammatory, disruptive or of such a nature as to place the employer in a position of ridicule.

(7) Whether there were substantial personal rights of expression and citizenship involved.

It appears, however, that where an employee's disclosure or criticism results in a significant disruption of the working relationship, the scales generally tip in favour of the employer, even though the employee may have acted in the public interest.[515]

d. Specific Statutory Anti-Retaliation Provisions

Certain statutes that create rights for, and impose duties upon, employees contain protections for such employees when they disclose wrongdoing by their employers as part of the exercise or performance of these rights or duties. These protections take the form of anti-retaliation provisions that prohibit discharges or discipline in respect of an employee's exercise of a statutory right, or fulfillment of a statutory duty.

New York that provides statutory protection for whistleblowers in specified circumstances: N.Y. Civ. Serv. Law § 75b (McKinney 1984), and N.Y. Lab. Law, Article 20-c (McKinney 1984).

[514] See *In re Los Angeles Herald-Examiner and Los Angeles Newspaper Guild*, *supra*, note 478; *In re Zellerback Paper Company, Los Angeles Plant and United Paper Workers International Union, Local 1400*, 75 LA 868 (1980); and *In re Town of Plainsville, Connecticut and American Federation of State, County and Municipal Employees, Local 1303, Council 4*, 77 LA 161 (1981).

[515] See discussion in Malin, *supra*, note 504, at 288-89.

Anti-retaliation provisions are commonly found in a wide range of employment laws creating rights for employees in such areas as labour relations,[516] labour standards,[517] occupational health and safety,[518] workers' compensation,[519] and civil rights legislation.[520] Such provisions generally prohibit employment reprisal against employees for complaints to a specified public authority with respect to breaches of employers' statutory duties, such as maintenance of safety in the workplace or payment of minimum wages, or for claiming a statutory benefit, such as workers' compensation. Anti-retaliation provisions are also commonly included in environmental legislation, as a mechanism for encouraging employees to monitor and report employer breaches of statutory duties.[521]

As a general rule, anti-retaliation provisions provide for reinstatement of an employee who has been subject to retaliation, together with compensation for loss of wages and seniority. Such provisions may also create civil sanctions against an employer who takes an employment reprisal, including the imposition of liability for the employee's legal costs and, where appropriate, exemplary damages.[522]

e. Whistleblower Statutes

(1) Introduction

While statutory anti-retaliation provisions offer some protection for employees who disclose wrongdoing on the part of their employers, such protections are generally limited to disclosure with respect to specific statutory breaches, and therefore represent, at best, a fragmented approach to the encouragement of disclosures in the public interest. Many jurisdictions in the United States have implemented broader schemes of statutory protection for whistleblowers.[523] One of the most comprehensive of these "whistleblower statutes" is the Civil Service Reform Act of 1978[524] (CSRA), which creates a scheme of protections for federal public employees who either have disclosed, or wish to disclose, government wrongdoing.

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[516] National Labour Relations Act, 29 U.S.C. § 158(a)(4) (1976), and New York State Labor Relations Act, N.Y. Lab. Law § 704(2), (5), (8) and (10) (McKinney 1977).

[517] Fair Labour Standards Act, 29 U.S.C. §§ 215(a)(3) and 216(b) (1975 & Supp. 1982).

[518] Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c) (1975).

[519] Workers' Compensation Law, N.Y. Work. Comp. Law § 120 (McKinney Supp. 1981), and Workers' Compensation and Insurance Act, Cal Lab. Code § 132a (West 1974 Supp. 1986).

[520] Title VII, Civil Rights Act of 1964, 42 U.S.C. §§ 2000 e-2 and 2000 e-3(a) (1981), and Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 623, 631 and 633(a) (1975 & Supp. 1982).

[521] Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (Supp. 1981); Clean Air Act, 42 U.S.C. § 7622 (Supp. Pamph. 1981); and Federal Water Pollution Control Act, 33 U.S.C. § 1367 (1978).

[522] Toxic Substances Control Act, 15 U.S.C. § 2622.

[523] State legislation protecting whistleblowers includes: Alaska Stat. § 39.51.020 (1984); Calif. Gov. Code §§ 10540-49 (West Supp. 1986); Conn. Gen. Stat. Ann. §§ 31-51m (West Supp. 1985); Ill. Ann. Stat. ch. 127, § 63b119c.1 (Smith-Hurd Supp. 1986); Ind. Code Ann. § 4-15-2-34-35, as added by Acts 1982, P.L. 23, § 30 (Burns Supp. 1985);

Like the statutory anti-retaliation provisions described above, the CSRA prohibits employment reprisals for specified types of disclosure, discussed below, and provides mechanisms of redress for such reprisals.

An employee who believes that he or she has been subject to a reprisal for whistleblowing may seek relief in one of several ways. First, where the reprisal has been of a serious nature, such as discharge or demotion, the employee may appeal directly to the Merit Systems Protection Board, established by the CSRA, alleging that a prohibited personnel action has been taken as a reprisal for whistleblowing.[525] Secondly, an employee who is subject to a collective agreement may be entitled to claim the CSRA protections as a defence to disciplinary action by the employer in the context of negotiated grievance procedures.[526] Finally, an employee may file a complaint in respect of a reprisal for whistleblowing with the Office of Special Counsel (OSC), also established under the CSRA, which is empowered to investigate the complaint and seek corrective action.[527]

However, the CSRA does more than merely provide retrospective protection of employees who have been subject to reprisal; the CSRA also creates a mechanism through which a prospective whistleblower, who might otherwise hesitate to make disclosure for fear of reprisal, may make disclosure anonymously and still ensure that the information that he or she provides is brought to the attention of the appropriate authorities. This mechanism operates through disclosure to the OSC and will be described in detail below.

(2) *Exclusions from Protection*

The CSRA protections do not, however, encompass all federal public employees. Section 2302(2)(B)(a) excludes:

> (i) a position which is excepted from the competitive service because of its

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La. Rev. Stat. Ann. § 42:1169 (West Supp. 1986); Mary. Ann. Code, 1957, Art. 64A, § 12G-K (1983); Mich. Comp. Laws Ann. §§ 15.361-.369 (West Supp. 1982); New York, *supra*, note 513; Or. Rev. Stat. § 240.316(5)(a-d)(1983); and Wash. Rev. Code Ann. §§ 42.40.010-.900 (West Supp. 1986). Some states, including Michigan and New York, have extended protection to both private and public sector employees.

[524] 5 U.S.C. §§ 1206-08 and 2302.

[525] *Ibid.*, § 7701. Such an appeal may also allege other forms of prohibited personnel practices, such as discrimination on the grounds of age, race or sex: *ibid.*, § 2302(b)(1).

[526] We are advised by the United States Office of Personnel Management that the whistleblowing protections may be provided as a matter of contract. Many collective agreements governing federal public employees incorporate, by reference, as a term of the agreement, the protections established by 5 U.S.C. § 2302(b)(8). Other collective agreements reproduce, in the agreement, the specific language of § 2302(b)(8).

[527] 5 U.S.C. § 1206; see discussion *infra*, this ch., sec. 4(b)(iv)e.(9).

confidential, policy-determining, policy-making, or policy-advocating character; or

(ii) any position excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration.

In addition, section 2303(2)(C)(a) excludes:

(i) a Government corporation;

(ii) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or

(iii) the General Accounting Office.

It will be recalled, however, that these excluded public employees are not totally without recourse. For example, such public employees who blow the whistle with respect to serious government wrongdoing might still derive some protection from the First Amendment.[528]

(3) The Grounds for Protected Disclosure

Section 2302(b)(8) of the CSRA prohibits an employment reprisal[529] against an employee for a disclosure of information by an employee that the employee reasonably believes evidences:

(i) a violation of any law, rule, or regulation,[530] or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.[531]

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[528] See discussion *supra*, this ch., sec. 4(b)(iii).

[529] A reprisal may be in the form of any "personnel action", which is broadly defined by 5 U.S.C. § 2302(a)(2)(A) to include discharges, performance evaluations, decisions concerning pay benefits and awards and "any other significant change in duties or responsibilities".

[530] "Law" is not defined. It has been suggested that "law" would include statutes, congressional resolutions and judicial interpretations of statutes: Vaughn, *supra*, note 502, at 626. "Rule" is a defined term under the Administrative Procedure Act, 5 U.S.C. § 551(4) (1976). "Regulation" is probably intended to encompass agency standards and practices not falling within this definition of "rule", including agency manuals, internal statements of statistical methodology, and Office of Management and Budget circulars: Vaughn, *supra*, note 502, at 627.

[531] 5 C.F.R. § 1250.3(d), passed pursuant to 5 U.S.C. § 1206(k), defines "gross waste of funds" to mean "unnecessary expenditure of substantial sums of money, or a series of instances of unnecessary expenditures of smaller amounts." Section 1250.3(e) defines "mismanagement" as "wrongful or arbitrary and capricious actions that may have an adverse effect on the efficient accomplishment of the agency mission." Section 1250.3(f) defines "abuse of authority" as "an arbitrary or capricious exercise of power by a

The CSRA requires that an employee reasonably believe that the information evidences wrongdoing of the prescribed type in order to be protected. This is apparently an objective standard, to be determined according to the circumstances of the case. However, it has been suggested that the requirement of reasonable belief might also involve an element of good faith that would deny protection to an employee who was motivated by malice.[532]

Protection attaches to disclosure of "information", which appears to require a factual basis for the disclosure, and would probably not extend to pure criticism of government policy.[533] However, it has been suggested that, since it is the ability of employees to understand and interpret the facts in the circumstances that makes the disclosure valuable, "information" would include elements of judgment, opinion, and even accusation.[534]

(4) Limitations on Public Disclosure

Not every disclosure of wrongdoing may be made publicly by the whistleblower. By virtue of section 2302(b)(8)(A), disclosure to the public is protected only where it is "not specifically prohibited by law" or is "not specifically required by Executive order to be kept secret in the interest of national defence or the conduct of foreign affairs".

"Prohibited by law" is not defined by the CSRA. It has been suggested that, in determining the meaning of this criterion, the standard established by the Freedom of Information Act[535] would be used; that is, public disclosure of information would be prohibited only if the statute containing the prohibition affords no discretion to control disclosure, or establishes criteria for withholding information, or refers to specific types of information to be withheld.[536] Such an interpretation would prevent agencies from limiting public disclosure of information through the mechanism of internal rule-making.[537]

Where information with respect to government wrongdoing falls within one of these confidential categories, protected disclosure may be made, under section 2302(b)(8)(B), to the OSC, the Inspector General of an agency[538] or

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Federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons."

[532] Vaughn, *supra*, note 502, at 626.

[533] *Ibid.*, at 623.

[534] *Ibid.*

[535] FOIA, *supra*, note 452. The term "prohibited by law" is discussed *supra*, this ch., sec. 4(b)(ii)b.

[536] Vaughn, *supra*, note 502, at 629.

[537] *Ibid.*

[538] Under the Inspector General Act of 1978, Pub. L. 95-492, 92 Stat. 1101 (1978), as am., Congress created a mechanism for the establishment within each agency of government of an "Inspector General", who would be charged with the internal investigation of complaints and allegations made by employees of that agency.

another employee designated by the head of the agency to receive such disclosures.[539]

(5) Whistleblowing to the Special Counsel

The OSC has been described as the independent investigative and prosecutive component of the Merit Systems Protection Board.[540] The three primary responsibilities of the OSC have been identified as:[541]

> (1) the investigation of allegations of activities prohibited by civil service law, rule or regulation, primarily allegations of prohibited personnel practices as defined in the CSRA and, if warranted, the initiation of a disciplinary or a corrective action;
>
> (2) the provision of a 'secure channel' through which allegations of waste, fraud, mismanagement, illegality, abuse of authority, or a substantial and specific danger to public health or safety may be made without fear of retaliation and without disclosure of identity except with the employee's consent; and
>
> (3) the enforcement of the Hatch Act, which restrains partisan political activities of civil servants.

Whistleblowing constitutes only a small portion of the matters that are directed to the OSC. For example, during fiscal year 1984, the OSC received 1,605 matters for evaluation relating to its three primary statutory responsibilities. Of these, 129, or approximately 8 percent, were employee disclosures of alleged wrongdoing and mismanagement, and 204, or approximately 14 percent, were complaints alleging reprisal for whistleblowing activities. There were 1,179 complaints alleging other prohibited personnel practices, and 93 were allegations of Hatch Act violations.[542]

(6) Requirement of Anonymity for Whistleblower

Where an employee blows the whistle to the Special Counsel, the Special Counsel is required to maintain the anonymity of the employee, unless the employee consents to disclosure of his or her identity or "unless the Special Counsel determines that disclosure of the identity of the employee or applicant is necessary in order to carry out the functions of the Special Counsel".[543] This requirement of anonymity for the whistleblower encourages the use of the

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[539] Vaughn, *supra*, note 502, at 621, suggests that, in order to encourage internal resolution of allegations, Congress intended "another employee designated" to include any official within the agency "chain of command" to whom it would be reasonable to make disclosure, unless there is an express statutory prohibition of disclosure to such persons.

[540] See "Report of the Office of the Comptroller General", in *Hearings Before the Subcommittee on Civil Service of the Committee on Post Office and Civil Service*, House of Representatives, 99th Cong., 1st Sess. (1985), Serial No. 99-19 (hereinafter referred to as "Hearings") 22, at 30.

[541] *Ibid.*, at 30-31.

[542] *Ibid.*, at 31.

[543] 5 U.S.C. § 1206(b)(1)(B).

Special Counsel "secure channel" by employees, even where public disclosure of information is not prohibited.[544]

(7) Agency Investigation and Report of Wrongdoing

Upon receipt of information evidencing a violation of any law, rule, or regulation, or mismanagement, gross waste of funds, abuse of authority or a specific and substantial danger to public health or safety, the Special Counsel is required to transmit the information promptly to the appropriate agency head.[545] The Special Counsel also has a discretion to require the agency head to investigate the matter and submit a written report regarding the alleged wrongdoing.[546] The threshold test for the exercise of this discretion is a determination by the Special Counsel that there is a "substantial likelihood"[547] that the information discloses one of the designated forms of government wrongdoing. However, even if the test of "substantial likelihood" is satisfied, the decision to require an investigation and report remains within the discretion of the Special Counsel.

Where the Special Counsel exercises his discretion and requires a written report, it must be reviewed and signed by the agency head, and must include the following information:[548]

> (A) a summary of the information with respect to which the investigation was initiated;
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> (B) a description of the conduct of the investigation;
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> (C) a summary of any evidence obtained from the investigation;
>
> (D) a listing of any violation or apparent violation of any law, rule, or regulation; and
>
> (E) a description of any corrective action taken or planned as a result of the investigation, such as —
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> (i) changes in agency rules, regulations, or practices;
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> (ii) the restoration of any aggrieved employee;
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> (iii) disciplinary action against any employee; and
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> (iv) referral to the Attorney General of any evidence of a criminal violation.

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[544] See discussion *supra*, this ch., sec. 4(b)(ii)b.

[545] 5 U.S.C. § 1206(b)(2).

[546] *Ibid.*, § 1206(b)(3)(A). The written report must be submitted within 60 days after the information is transmitted, or within any longer period of time agreed to in writing by the Special Counsel.

[547] *Ibid.*

[548] *Ibid.*, § 1206(b)(4).

The report is subject to restrictions with respect to confidential information. The agency is neither required nor authorized to disclose information that is specifically prohibited from disclosure by any other provision of law,[549] or specifically required by Executive order to be kept secret in the interest of national defence or the conduct of foreign affairs.[550]

(8) Disclosure of Agency Report

Upon receipt of the report from the agency, the Special Counsel is required to submit it to Congress and the President. The Special Counsel is also required to give the report to the whistleblower,[551] except where the report contains evidence of a criminal violation that has been referred to the Attorney General.[552] Where the agency head fails to submit the report within the prescribed time, the Special Counsel may transmit a copy of the whistleblower's information to Congress and the President, together with a statement indicating that the the head of the agency has failed to file the report as required.[553]

The Special Counsel is required to maintain, and make available to the public, a list of those matters, other than criminal matters, that have been referred to agency heads. A report from a head of an agency, if any, must also be included in the public list. The Special Counsel is required to ensure that the public list does not contain information the disclosure of which is prohibited by law or Executive order.[554]

(9) Corrective Action

Upon receipt of the agency report, the Special Counsel is required to review the report and determine whether it contains the information required, and whether the findings are reasonable.[555]

Where the Special Counsel determines, upon reasonable grounds, that there has been a reprisal for whistleblowing in a form that requires "corrective action",[556] he must report such a determination, together with his recommendations as to corrective action, to the Merit Systems Protection Board and to the agency involved.[557] If, after a reasonable time, the agency has not taken the corrective action recommended, the Special Counsel has a discretion to make an application to the Merit Systems Protection Board to consider the matter and to make an order for corrective action with respect to the reprisal.

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[549] See discussion *supra*, this ch., sec. 4(b)(ii)b.

[550] 5 U.S.C. § 1206(b)(8).

[551] *Ibid.*, § 1206(b)(5)(A).

[552] *Ibid.*, § 1206(b)(5)(B).

[553] *Ibid.*, § 1206(b)(5)(A).

[554] *Ibid.*, § 1206(d).

[555] *Ibid.*, § 1206(b)(6).

[556] "Corrective action" is not defined by the Act. It appears, however, that the authority of the Special Counsel is to seek correction of the prohibited personnel action, and not of the violation of law, rule or regulation or of the other prescribed forms of government wrongdoing. The responsibility for correcting the wrongdoing itself presumably lies with the agency, Congress and the President.

It appears, however, that applications for corrective action with respect to reprisals against individual employees are not commonly made by the OSC. The incumbent Special Counsel, K. William O'Connor, has taken the view that the OSC is not a remedial system for individual employees who claim to have suffered reprisals for whistleblowing.[558] Rather, he likens the role of the OSC to that of a prosecutor in the criminal justice system, who represents the public interest rather than the interests of the victim of a criminal act.

Special Counsel O'Connor considers his role to be the protection of the merit system itself through the investigation of violations of merit system laws, rules, and regulations and their prosecution before the Merit Systems Protection Board,[559] and not the provision of advocacy services for aggrieved employees. In his view, it is only to the extent that an employee benefits incidentally from the enforcement of federal personnel laws that the OSC can be considered part of the remedial system available to individual employees.

Support for this interpretation of the role of the OSC is found in the decision of the United States Court of Appeals for the District of Columbia Circuit in *Frazier v. MSPB*,[560] wherein the Court observed that the Special Counsel is fundamentally concerned with the integrity of the merit system, a concern that differs from that of the individual employee who seeks ''personal restoration''. The Court took the view that the principal recourse for individual employees who have suffered an employment reprisal as a result of whistleblowing is an appeal to the Merit Systems Protection Board, and not to the Office of Special Counsel.[561]

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[557] 5 U.S.C. § 1206(c)(1)(A). The Special Counsel also has a discretion to report such a determination to the President.

[558] See the statement of K. William O'Connor, the Special Counsel of the Merit Systems Protection Board, in Hearings, *supra*, note 540, at 242-53.

[559] 5 U.S.C. § 1206(g)(1) provides that, where the Special Counsel determines that disciplinary action should be taken against an employee who has engaged in a prohibited personnel practice, including reprisal for whistleblowing, the Special Counsel is required to prepare and present a written complaint against the employee containing his or her determination, together with a statement of supporting facts, to the employee and the Merit Systems Protection Board. The employee is subject to procedural safeguards set out in 5 U.S.C. § 1207.

[560] 672 F. 2d 150 (D.C. Cir. 1982), at 163.

[561] *Ibid*. 5 U.S.C. § 7701 provides individual employees and applicants with the right to appeal certain serious adverse personnel actions, such as removal or demotion, directly to the MSPB. Certain less serious personnel actions, including a performance evaluation, relocation, and change in duties with no reduction in grade or pay, are reviewable by the MSPB only if brought before it by the Special Counsel and only if they are allegedly taken as a result of a prohibited personnel practice: 5 U.S.C. § 1206.

Special Counsel O'Connor regards his authority to seek "corrective action" of violations of the merit system as consistent with his view that his role is to protect the system, rather than the individual. His focus is on institutional, rather than individual, corrective action; for example, the corrective action sought by the Special Counsel may be to secure an agency's commitment to adhere to merit system principles in the future. While recognizing that employees may be dissatisfied with the type of corrective action that the OSC negotiates with agencies, the Special Counsel emphasizes that his role is not "to gratify the individual's personal wishes as to what he or she believes ought to be done for them."[562] Therefore, while corrective action settlements by the Special Counsel may occasionally benefit individual complainants by revising adverse personnel actions, such settlements are incidental to the primary agency focus on disciplinary prosecution.

(10) Proposed Reform of CSRA Whistleblowing Provisions

It appears that this emphasis on the prosecutorial role of the Special Counsel, rather than on giving assistance to individual employees, was the result of a discretionary administrative decision by the incumbent Special Counsel O'Connor who, together with his immediate predecessor, made deliberate efforts to redirect the priorities of the OSC.[563] This emphasis has been the subject of much critical comment in the United States.[564] Opponents of this view contend that the Special Counsel was meant to be primarily responsible for providing meaningful protection to individual whistleblowers and other aggrieved federal employees.

As a result of this criticism, a Bill has been introduced in Congress, the stated purpose of which is to strengthen and improve the protection of whistleblowers who have suffered reprisal by:[565]

> (1) mandating that victims of prohibited personnel practices, especially whistleblowers, should be restored to their previous positions;
>
> (2) establishing that —
>
> (A) the primary role of the Office of Special Counsel is to protect employees, especially whistleblowers; and
>
> (B) while disciplining those who commit prohibited personnel practices

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[562] Hearings, *supra*, note 540, at 34. The Court in *Frazier*, *supra*, note 560, at 162, supported this view of corrective action petitions (emphasis in original):

> [I]f [5 U.S.C. § 7701] appeals can be analogized to civil proceedings in which the immediate interests are personal to the litigants, corrective action petititions are comparable to criminal prosecutions designed to vindicate the *public* interest.

[563] Hearings, *supra*, note 540, at 34-35.

[564] See, particularly, statements to the Congressional Subcommittee on the Civil Service in *ibid.*, at 94-234.

[565] H.R. 4033, 99th Cong., 2d Sess. (1986).

> may be used as a tool to help accomplish this goal, the protection of individuals is the priority; and
>
> (3) providing that the Office of Special Counsel establish a lawyer-client relationship with employees who claim to have been subject to prohibited personnel practices.

The Bill would expressly change the role of the Special Counsel. Section 1212(a)(1) would provide as follows:

> (a) the Office of Special Counsel shall —
>
> (1) represent and act as legal counsel on behalf of employees alleging prohibited personnel practices before the Merit Systems Protection Board and Federal courts ....

Section 1212(b)(1) and (2) of the Bill would confer on the Special Counsel broad investigative powers, including the power to subpoena and examine witnesses, administer oaths and take depositions.

Section 1214 of the Bill would require the Special Counsel to seek a stay of a personnel action and apply for corrective action whenever there were reasonable grounds to believe that a prohibited personnel practice has occurred, thus removing the discretion that the Special Counsel currently enjoys with respect to such actions.[566] Similarly, section 1213(c) would require the Special Counsel to obtain a report with respect to whistleblowing from an agency head whenever there is a substantial likelihood of wrongdoing. The Special Counsel currently has a discretion whether to require such a report.[567]

Section 1221 of the Bill would permit an employee to bring an independent application for corrective action to the Merit Systems Protection Board with respect to any prohibited personnel practice. Appeals by employees to the Merit Systems Protection Board are currently limited to such serious discipline as discharge or demotion.[568] An employee who has suffered reprisal in the form of other prohibited personnel practices, such as transfers or denial of education leave, must currently rely on the Special Counsel to make such an application, since the Special Counsel may seek corrective action with respect to *any* prohibited personnel practice.[569]

The Bill is still before the Subcommittee on Civil Service of the Committee on Post Office and Civil Service of the House of Representatives.

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[566] See discussion *supra*, this ch., sec. 4(b)(iv)e.(9).

[567] See discussion *supra*, this ch., sec. 4(b)(iv)e.(7).

[568] 5 U.S.C. § 7701.

[569] *Ibid.*, § 1206(c)(1).

5. AUSTRALIA

(a) POLITICAL ACTIVITY

In Australia, the issues of political activity and public comment by public servants have received more detailed attention at the federal level. We shall therefore concentrate our discussion primarily on federal regulation. Thereafter, we shall deal generally with the states.

(i) Federal

a. Political Activity

In 1982, the Public Service Board published "Guidelines on Official Conduct of Commonwealth Public Servants".[570] These Guidelines deal comprehensively with a variety of issues, including political activity, public comment, and confidentiality.[571] The Guidelines are especially important because few of the issues relating to political activity have been addressed by legislation. The only statutory provisions bearing upon political activity are section 44(iv) of the *Commonwealth of Australia Constitution Act*,[572] and section 47C of the *Public Service Act* 1922-1973.[573] The former renders a person who "[h]olds any office of profit under the Crown … incapable of being chosen or of sitting as a senator or as a member of the House of Representatives". The latter provides for reappointment of public servants who have "retired" to become candidates for election to the federal Parliament or a state legislature, but have failed to be elected.

The Guidelines on political activity reflect an attempt to reconcile the belief of the Public Service Board in the importance of a nonpartisan public service[574] with its recognition "that public servants should not be precluded from participating, as citizens in a democratic society, in the political life of the community".[575] Thus, the Board accepts, as a general principle, that public servants should enjoy the same political rights as other citizens so long as the political neutrality of the public service is safeguarded.

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[570] Australia, Public Service Board, *Personnel Management Manual (Vol. 3): Guidelines on Official Conduct of Commonwealth Public Servants* (1982) (hereinafter referred to as "Guidelines"). The guidelines were amended in September, 1982 and July, 1983.

[571] Five chapters cover the following general topics: relationships between officials, the government, and the Parliament; financial and other private interests; information, privacy and fairness in decision-making; political and industrial participation; and personal behaviour. The chapter entitled "Information, Privacy and Fairness in Decision-Making" addresses the question of public comment by public servants.

[572] 63 and 64 Vict., c. 12 (1900).

[573] *Public Service Act* 1922-1973, s. 47C, as am. by Act No. 59, 1974, s. 4, Act No. 170, 1978, ss. 14 and 38, and Act No. 111, 1982, s. 26.

[574] The discussion of political participation begins with the assertion that "[t]he political framework in Australia assumes the existence and continued maintenance of a nonpartisan Public Service capable of serving a Government of any political colour with impartiality and loyalty": see Guidelines, *supra*, note 570, para. 5.1, at 53.

[575] *Ibid.*, para. 5.3, at 53.

Before dealing with particular types of political activity, the Guidelines set forth certain general principles. First, it is stated that public servants should not use their positions to communicate their political views; this is a matter of particular concern where the nature of their duties brings public servants into contact with persons outside government.[576] Secondly, it is acknowledged that the propriety of political participation will depend on the nature of the duties of public servants, and that public servants having contact with a minister or having influence on policy will have to be more circumspect than others.[577]

The Guidelines state that, in the absence of legislative restriction, reliance is placed on the exercise of good judgment by individual public servants to ensure that any political activity on their part "do[es] not affect their role as public servants, bearing in mind the changing nature of that role as they progress to the more senior positions in the Service".[578] However, it should also be noted that, under the *Public Service Act* 1922-1973, an officer may be liable to discipline if he has "failed to fulfil his duty as an officer".[579] Section 56 of the Act provides that "an officer shall be taken to have failed to fulfil his duty as an officer if and only if ... (d) he engages in improper conduct as an officer; [or] (e) he engages in improper conduct otherwise than as an officer, being conduct that affects adversely the performance of his duties or brings the Service into disrepute".[580] Hence, the failure to exercise sound judgment in relation to political activity may have deleterious consequences.

The Guidelines specifically address several types of political activity. Public servants enjoy the freedom to become members of any party, but are cautioned that membership in an extreme party or group may be relevant to security assessment for positions for which security clearance is required.[581]

The Guidelines advise that the propriety of holding office in a party political organization, which is not addressed by legislation, will depend on "[t]he sort of position held and its political sensitivity, and the position in the Public Service particularly in relation to seniority and access to confidential information".[582] However, to the extent that public servants do serve in a party office, they are expected to dissociate their private political activities from their position in the public service.[583]

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[576] *Ibid.*, para. 5.4, at 53.

[577] *Ibid.*, para. 5.5, at 53.

[578] *Ibid.*, para. 5.7, at 53.

[579] *Public Service Act* 1922-1973, *supra*, note 573, ss. 57(1) and 61(1), as en. by Act No. 170, 1978, s. 20, and as am. by Act No. 111, 1982, s. 37.

[580] *Public Service Act* 1922-1973, s. 56, as en. by Act No. 178, 1978, s. 20.

[581] See Guidelines, *supra*, note 570, paras. 5.8-5.9, at 54.

[582] *Ibid.*, para. 5.10, at 54.

It would appear that prior approval must be obtained to hold municipal office. Municipal duties must be discharged by public servants on their own time and without harm to their work as public servants. In relation to municipal political activity, public servants are advised to have special regard to the rules governing public comment.[584]

On the matter of candidacy, the Guidelines advise resignation from the public service prior to nomination as a candidate for election to the federal Parliament or a state Parliament. With respect to the federal Parliament, resignation is recommended to avoid the risk of the election being held invalid pursuant to the federal legislation that renders public servants incapable of serving in office.[585] With respect to election to a state Parliament, public servants are advised to seek legal advice as to whether resignation is necessitated by the relevant state legislation.[586] Public servants may also take leave to become candidates. As a matter of policy, the Public Service Board favours resignation:[587]

> The Board considers that resignation by parliamentary candidates is desirable, as it minimises the conflict between the role of an impartial public servant and an active political campaigner, and the reputation of the Service as disinterested, loyal and, professional is not compromised. While the taking of leave as an alternative to resignation may in fact broadly achieve the same result, there is not the same symbolic legal break with the Service, and whilst on leave an officer or employee is still subject to the obligations of the Public Service Act and Regulations.

Under the *Public Service Act* 1922-1973, a public servant who has retired from the public service in order to become a candidate, but has been unsuccessful in the election, may apply to the Public Service Board for reappointment.[588] Although the Board has a discretion whether to reappoint public servants, the

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[583] *Ibid.*, para. 5.11, at 54. By way of example, public servants are advised to avoid "identifying themselves as public servants when appearing publicly in relation to their political activities ... [and] not [to use] their public office or facilities to promote any political party": *ibid.* Also relevant is the requirement under s. 91 of the *Public Service Act* 1922-1973, *supra*, note 573, for approval by the Public Service Board of employment outside the service, even in cases where it is not remunerated: see Guidelines, *supra*, note 570, paras. 5.12-5.13, at 54.

[584] *Ibid.*, paras. 5.14-5.15, at 54-55.

[585] See *Commonwealth of Australia Constitution Act*, *supra*, note 572, s. 44(iv).

[586] See Guidelines, *supra*, note 570, paras. 5.16-5.17, at 55.

[587] *Ibid.*, para. 5.23, at 56.

[588] *Public Service Act* 1922-1973, *supra*, note 573, ss. 47C and 82B, as am. by Act No. 59, 1974, ss. 4 and 5, Act No. 170, 1978, ss. 14 and 38, Act No. 111, 1982, s. 25(2), and Act No. 63, 1984, s. 91.

Guidelines indicate that the Board has thus far reappointed all former officers who have so requested.[589]

Public servants may campaign for candidates, for example, by fundraising, canvassing, or distributing literature on polling day, provided that they dissociate these activities from their positions in the government, and provided that they do not use office facilities.[590]

The Guidelines address "the wearing or display of political material" while on duty. The propriety of such activity depends on whether there is contact with the public by the public servant in the discharge of his or her duties. Where no such contact occurs, wearing or displaying political material is a matter of personal decision.[591] Where there is contact with the public, such behaviour is unacceptable on the ground that "it jeopardises the impartial standing of the Public Service and represents an unfair imposition on a 'captive' public".[592]

Unlike almost all the jurisdictions we have discussed, the Australian Guidelines deal expressly with the propriety of public servants actively supporting "issues or movements of a non-party political nature".[593] After noting the absence of legislation and policy concerning this matter, the Guidelines state that the duties and seniority of the public servant are relevant considerations, and that the guidelines respecting public comment are pertinent as well.[594] It is noted, however, that since certain contentious issues may involve a strong commitment to an organized movement, this may pose ethical problems akin to those arising from strong political affiliation. Thus, the following advice is offered:[595]

> - in relation to the display of propaganda on contentious issues, the same guidelines would apply as to party political propaganda
>
> - in situations where officers, because of personal commitments, feel they are unable to carry out certain official duties or instructions, conflicts may often be resolved by discussion between officers and their supervisors. Officers can seek to be relieved of the specific duty or instruction concerned. If necessary, officers may seek to transfer to another area of the department or the Service or, in the last resort, elect to resign....

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[589] See Guidelines, *supra*, note 570, para. 5.20, at 55.

[590] *Ibid.*, para. 5.25, at 56.

[591] *Ibid.*, para. 5.28, at 56. However, officers are enjoined to give serious consideration to the possibility of offending colleagues and visitors, and to any official restriction on displaying material on staff notice boards in certain areas (*ibid.*).

[592] *Ibid.*, para. 5.28, at 57.

[593] *Ibid.*, paras. 5.29-5.31, at 57.

[594] *Ibid.*, para. 5.29, at 57.

[595] *Ibid.*, para. 5.31, at 57.

Finally, the Guidelines address the propriety of public comment on matters of national political controversy. It is envisaged that the general guidelines on public comment, which we shall discuss in the next section, will govern this matter. Officers are cautioned that a failure to observe the required standard of conduct in this regard may constitute "improper conduct as an officer" and may lead to discipline.[596]

b. Public Comment

Until its repeal in 1974, public servants were subject to Public Service Regulation 34(b), which forbade public comment upon administration action or upon the administration of any department. In the Guidelines, the Board states its views at some length on public comment on matters of policy and administration:[597]

> The objectives are:
>
> - to give public servants greater freedom by minimising the restrictions on public comment, and
> - to encourage appropriate activities of an academic kind by staff who have special expertise,
>
> while at the same time recognising that some restrictions related to public controversy are necessary to maintain the identity of a politically impartial, career public service able to serve equally well the government of the day, whatever party is in office ....
>
> NOTE: The words 'public comment' are used broadly and include public speaking engagements (including comments on radio and television) and expressing views in letters to the press, or in books, notices, etc.
>
> Reasoned public discussion on the factual and technical background to policies and administration can, of course, lead to better public understanding of the processes and objectives of government. But in the Australian system of Parliamentary government, the public defence of Government policies and administration has traditionally been, and should remain, the preserve of Ministers, not of public servants in departments.
>
> Of course, some staff, as part of their normal duties, provide comment to the media and the public, explaining departmental activities and possibly, at the highest levels, defending the department against criticism of its probity or competence (although this would normally be appropriately a matter for the Minister).
>
> The relationship between Ministers and their Public Service advisers could be placed in jeopardy if the advisers, who have opportunities to present their views within the Service, became publicly identified as supporters or antagonists of particular parties or policies. Whatever their personal views and no matter how strongly they are held, in areas for which the Government is responsible individual public servants should refrain from public comment which may convey the

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[596] *Ibid.*, paras. 5.26-5.27, at 56.

[597] *Ibid.*, para. 4.10, at 40-42.

> impression that they are not prepared to implement policies of the elected Government wholeheartedly and in a way which gives maximum expression to the letter and spirit of those policies.
>
> It is impossible to prescribe precise rules to cover a diverse Public Service — the subject matter; the status and duties of the public servant; whether his own Minister, Department or activity is involved; the timing of the comment, etc, may be relevant. In the ultimate, the officer's own good sense and integrity would normally guide him and in this regard he may need to be mindful that he may not be aware of all relevant factors. But the following points give some general guidance:
>
> - personal attacks should be avoided
> - officers in relevant areas should avoid comment which might cause embarrassment to the Australian Government's relations with another Government
> - unless properly authorised and any necessary clearance obtained, the officer should avoid any suggestion that he is speaking on behalf of his Department — discretion should be exercised in referring to his Public Service office and his official role should not be exaggerated
> - particularly where he engages in unrehearsed debate, an officer will need to be mindful not only of what he says but also of how it might be interpreted
> - although generally officers may comment on their terms and conditions of employment and Territorial residents may comment on local civic affairs, those whose work is to provide advice on these matters should avoid public controversy on them.

(ii) The States

Based on a survey of the Australian states, it would appear that a generally permissive approach has been taken to political activity by public servants. Very little attention has been given to this issue by legislation.

Like Ontario,[598] each of the states provides that public servants are ineligible to sit as members of the state legislative body.[599] However, public servants may become candidates for that office while they are employed as public servants and, if elected, must resign their positions as Crown employees.[600] Apparently, in certain states there is no statutory requirement that leave be taken for the purpose of becoming candidates, and it would appear that only in Queensland does the legislation provide expressly that leave to contest an election may be taken.[601]

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[598] See *Legislative Assembly Act*, R.S.O. 1980, c. 235, s. 8(1), and *Election Act, 1984*, S.O. 1984, c. 54, s. 26(1)(d).

[599] See, for example, Victoria *Constitution Act* 1975, No. 8750, s. 49; New South Wales *Constitution Act, 1902*, Act No. 32, 1902, s. 13B, as en. by Act No. 75, 1978, s. 3(1); Queensland *Officials in Parliament Acts 1896 to 1961*, s. 5(1); and South Australia *Constitution Act, 1934-1982*, s. 45(2), as en. by Act No. 57, 1982, s. 2.

[600] See, for example, Victoria *Constitution Act* 1975, *supra*, note 599, s. 61, as en. by No. 9077, s. 3, as am. by No. 9788, s. 3(1)(a), No. 9921, s. 255, and No. 10029, s. 22; New South Wales *Constitution (Public Service) Amendment Act, 1916*, Act No. 45, 1916, s. 2, as am. by Act No. 78, 1978, s. 2; and Queensland *Officials in Parliament Acts 1896 to 1961*, s. 5(2).

In South Australia, a person who has resigned from the public service in order to become a candidate for election to the state Parliament or the Commonwealth Parliament and is unsuccessful, may, on application, be reappointed to the public service.[602] In New South Wales, provision is made for reappointment to the public service where a public servant has resigned in order to become a candidate for election to the Commonwealth House of Representatives or Senate, and is unsuccessful.[603]

The question of reinstatement following service as a member of the state Parliament is addressed in Victoria, which provides for reemployment in a classification grade or office not inferior to that occupied when the public servant was elected to office.[604]

Certain states have dealt with the right to hold municipal office. Both the Western Australia *Public Service Act, 1978*[605] and the Victoria *Public Service Act* 1974[606] require the permission of the state Public Service Board before a public servant may accept or continue to hold an office in or under a municipality.

The propriety of public comment is addressed by the South Australia *Public Service Act, 1967-1975*. It provides that it is a disciplinary offence if a public servant "without the permission of the Minister directly or indirectly and whether anonymously or otherwise, makes any communication or contribution or supplies any information to any newspaper or publication of a similar nature on any matter affecting the Public Service or any Department thereof or the business or the Officers of the Public Service or any Department thereof or on his own Office or his own acts or duties as an Officer".[607]

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[601] *Officials in Parliament Acts 1896 to 1961*, s. 5(3).

[602] South Australia *Public Service Act, 1967-1975*, s. 44.

[603] See *Public Service (Commonwealth Elections) Act, 1943*, Act No. 12, 1943, s. 2.

[604] *The Constitution Act Amendment Act* 1958, No. 6224, s. 30, as am. by No. 6957, s. 12(1)(b), No. 7142, s. 2 and Sch., No. 9427, ss. 3 and 6(1), No. 9788, s. 4(1), and No. 10029, s. 19(1)(a), (b), and (c).

[605] *Public Service Act, 1978*, No. 86 of 1978, s. 54(1)(a).

[606] *Public Service Act* 1974, No. 8656, s. 54(1)(d).

[607] *Public Service Act, 1967-1975*, s. 58(j). In Campbell and Whitmore, *Freedom in Australia* (2d ed., 1973), at 351, reference is made to Victoria Public Service Reg. 22, which is to the same effect. It is also stated (at 351) that regulations in New South Wales, Queensland, and Western Australia prohibit public comment "upon any administrative action or upon the administration of any Department" in almost identical terms as former federal Public Service Reg. 34(b), discussed *supra*, this ch., sec. 5(a)(i)b. Due to the local unavailability of Australian regulations of both the federal government and the state government, it was not possible to ascertain the current status of these regulations.

Apart from these limitations, the only other statutory provision that may have some bearing on political activity is found in state legislation that provides that an act of misconduct, or improper behaviour that is otherwise defined, may render a public servant liable to discipline.[608]

In Victoria, the rather skeletal legislative framework is supplemented by guidelines that deal with political activity.[609] The guidelines advise that public servants "have the same right as any other citizen to freedom of political association".[610] Political activity, however, should be "clearly undertaken in a private capacity".[611] Public servants are cautioned that, in engaging in partisan activity, care should be taken to avoid a conflict of interest with their official duties, which is more likely to arise where "the area of political involvement corresponds in some measure with the official duties of the officer or employee".[612] If an actual or potential conflict of interest is perceived, it is the responsibility of the public servant to inform his or her chief executive, who, in turn, is obliged to consult the Minister in order to assess the extent of any conflict and to determine what arrangements should be made as a result.[613]

Employees are advised to take part in party politics only outside working hours. If they wish to do so during normal working hours, they must apply for approval of a leave of absence or time off pursuant to the general rules governing such matters.[614]

Under the Victoria *Constitution Act* 1975, a public servant who is elected to the state Parliament "shall cease to hold that office or place of profit under the Crown."[615] Under the Act, there is no requirement that leave be taken prior to election. The guidelines, however, state that "[i]t is the practice for public servants seeking election to the Parliament to take leave of absence for the campaign indicating that, if elected, they will resign from their office in the public service".[616]

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[608] See, for example, Victoria *Public Service Act* 1974, *supra*, note 606, s. 59(1)(b) ("any act of misconduct"); Western Australia *Public Service Act, 1978, supra*, note 605, s. 44(1)(c) ("any act of misconduct"); South Australia *Public Service Act, 1967-1975*, s. 58(g) ("conducts himself in a disgraceful, improper or unbecoming manner in his official capacity or otherwise"); and New South Wales *Public Service Act, 1979*, Act No. 89, 1979, s. 85(f) ("any disgraceful or improper conduct").

[609] Victoria, "Guidelines on Party Political Activity by Victorian Government Officers and Employees", unpublished (issued November, 1983) (hereinafter referred to as "Victoria guidelines").

[610] *Ibid.*, para. 1.

[611] *Ibid.*, para. 2.

[612] *Ibid.*, para. 4.

[613] *Ibid.*, para. 5.

[614] *Ibid.*, para. 9.

[615] Victoria *Constitution Act* 1975, *supra*, note 599, s. 61, as en. by No. 9077, s. 2, as am. by No. 9788, s. 3(1)(a), No. 9921, s. 255, and No. 10029, s. 22.

[616] Victoria guidelines, *supra*, note 609, para. 7.

As indicated earlier, the Victoria *Public Service Act* 1974 allows public servants to hold municipal office provided that they have received the approval of the Public Service Board. The guidelines indicate that persons who serve as councillors may be granted three hours leave of absence for municipal activities every two weeks, and that mayors may be granted leave for up to three hours a week.[617]

(b) CONFIDENTIALITY

(i) Federal

Federal public servants are under a duty, imposed by regulation, not to disclose certain information. Public Service Regulation 35 states that "[e]xcept in the course of official duty, no information concerning public business or any matter of which an officer or employee has knowledge officially shall be given, directly or indirectly, nor shall the contents of official papers be disclosed, by an officer or employee without the express authority of the Chief Officer". Contravention of, or a failure to comply with, a regulation made pursuant to the *Public Service Act* 1922-1973 may lead to discipline.[618]

In addition, the *Crimes Act* 1914 creates an offence where a public servant "publishes or communicates, except to some person to whom he is authorized to publish or communicate it, any fact or document which comes to his knowledge, or into his possession, by virtue of his office, and which is his duty not to disclose".[619] A person who is guilty of such an offence is liable to imprisonment for two years. This offence is distinct from offences relating to espionage and official secrets, which are set out in a separate Part of the *Crimes Act* 1914.

Finally, there are legislative provisions that restrict disclosure of information.[620]

In 1982, the *Freedom of Information Act* 1982[621] was passed. The Act creates a general right of access to government documents, except for documents that are classified as "exempt documents" under the Act.[622] Among the classes of exempt documents[623] identified in the Act are documents that are prohibited from disclosure by an enactment.[624]

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[617] *Ibid.*, para. 10.

[618] *Public Service Act* 1922-1973, s. 56(f), as en. by Act No. 170, 1978, s. 20. See generally, *Public Service Act* 1922-1973, ss. 57-62, as en. by Act No. 170, 1978, s. 20.

[619] *Crimes Act* 1914, No. 12, 1914, s. 70, as en. by Act No. 84, 1960, s. 49, and am. by Act No. 67, 1982, s. 14, and Act No. 63, 1984, s. 152(1) and Sch. 5.

[620] See Australia, Senate Standing Committee on Constitutional and Legal Affairs, *Freedom of Information* (1979), which states (para. 21.1, at 233) that "there are upward of 290 provisions in other Acts, ordinances, regulations and statutory instruments that authorise, empower, or require designated officers and bodies to restrict disclosure of particular categories of information".

[621] Act No. 3, 1982.

[622] *Ibid.*, s. 11.

(ii) The States

The matter of disclosure of information has received specific attention in certain states. The public service statutes of Queensland and South Australia provide that it is a disciplinary offence for a public servant to disclose information acquired in the course of his or her duties, otherwise than in the discharge of those duties, except with the permission or pursuant to the direction of the Minister.[625] In Queensland, in addition, the *Criminal Code*[626] includes an offence for wrongful disclosure of information, punishable upon conviction by a term of imprisonment up to two years. Section 86 of the Code provides that it is an offence where a person employed in the public service "publishes or communicates any fact which comes to his knowledge by virtue of his office and which it is his duty to keep secret, or any document which comes to his possession by virtue of his office and which it is his duty to keep secret, except to some person to whom he is bound to publish or communicate it". The Western Australia *Criminal Code* includes an identical provision.[627]

It would appear that certain states, such as New South Wales, have a public service regulation that prohibits the unauthorized disclosure of information.[628] Where the *Public Service Act* provides that a breach of that Act or the regulations constitutes a disciplinary offence,[629] a contravention of this regulation will involve the risk of sanctions.

In addition, there are numerous specific statutory and regulatory provisions in the states that prohibit the disclosure of certain information by public servants.[630]

If there is neither a statutory provision nor a regulation bearing directly upon disclosure of information, a public servant who releases information without authorization may find that this disclosure falls within the embrace of a general provision in the *Public Service Act* proscribing improper conduct on the part of public servants.[631]

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[623] *Ibid.*, ss. 32-47.

[624] Section 38 defines a document as an exempt document "if there is in force an enactment applying specifically to information of a kind contained in the document and prohibiting persons referred to in the enactment from disclosing information of that kind, whether the prohibition is absolute or is subject to exceptions or qualifications". Section 4(1) of the Act defines "enactment" as "(a) an Act ... or (c) an instrument (including rules, regulations or by-laws) made under an Act ...". For a discussion of s. 38, see Bayne, *Freedom of Information* (1979), at 163-72.

[625] See Queensland *Public Service Act* 1922-1978, s. 32(1)(viii), and South Australia *Public Service Act, 1967-1975*, s. 58(i).

[626] Being Schedule 1 to *The Criminal Code Act, 1899*, s. 2.

[627] Being Appendix B to the *Criminal Code Act Compilation Act, 1913*, s. 81. See *Cortis v. R.*, [1979] W.A.R. 30 (S.C., C.C.A.).

[628] See Public Service Reg. 23, quoted in Campbell and Whitmore, *supra*, note 607, at 347.

[629] See, for example, New South Wales *Public Service Act, 1979*, *supra*, note 608, s. 85(a).

[630] See Campbell and Whitmore, *supra*, note 607, at 347.

Finally, mention should be made of the Victoria *Freedom of Information Act* 1982,[632] the only state freedom of information statute. Like the federal Act,[633] the Victoria Act creates a general right to obtain access to documents, other than documents that are classified as "exempt documents" under the Act.[634] An exemption is drafted in precisely the same terms as under the federal Act for documents that contain information that is required to be kept secret under an enactment.[635]

6. NEW ZEALAND

(a) POLITICAL ACTIVITY

In New Zealand, while the political neutrality of public servants apparently is regarded as a "constitutional requirement",[636] the only legislation bearing directly on this issue is the *Electoral Act 1956*,[637] which deals with candidacy and election to Parliament.

Section 30 of the Act provides that a state servant who desires to become a candidate for election as a member to Parliament shall be placed on leave of absence for this purpose. Generally, the period of leave is to commence on nomination day[638] and, if the person is nominated, will continue until the first working day after polling day, unless he or she withdraws the nomination.[639] However, the period of leave may be required to begin on an earlier day if the "controlling authority of any State servant is satisfied that the State servant desires to become a candidate and that the candidacy will materially affect the ability of that State servant ... (a) [t]o carry out satisfactorily his duties as a state servant; or (b) [t]o be seen as independent in relation to particular duties".[640]

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[631] See *supra*, note 608. See, also, Campbell and Whitmore, *supra*, note 607, at 347.

[632] *Freedom of Information Act* 1982, No. 9859.

[633] *Supra*, note 621.

[634] *Freedom of Information Act* 1982, *supra*, note 632, ss. 28-38.

[635] *Ibid.*, s. 38. Section 5 of the Victoria Act defines "enactment" to mean "an Act or an instrument (including rules, regulations or by-laws) made under an Act".

[636] New Zealand, State Services Commission, Management Leaflet No. 6, "The Public Service and Ministers" (June, 1983) (hereinafter referred to as "Management Leaflet"), at 3.

[637] 1956, No. 107, s. 30, as en. by 1981, No. 120, s. 10(1).

[638] Section 2(1) defines "nomination day" to mean "the day appointed in the writ for election as the latest day for the nomination of candidates".

[639] *Ibid.*, s. 30(3).

[640] *Ibid.*, s. 30(4).

While on leave, the state servant is not entitled to receive any of his or her salary or other remuneration, except to the extent that the period of leave includes leave with pay to which he or she is otherwise entitled. During leave to become a candidate, the state servant is not permitted and cannot be required to perform any official duties.[641]

Finally, section 30 concludes with a statement that a person's rights as a state servant are not to be affected by candidacy, except as otherwise provided.[642]

Upon being declared elected to Parliament, a state servant is deemed to have vacated his or her office.[643] It appears that, although the *Electoral Act 1956* provides for the reinstatement of a state servant in the event that the results of the election are subsequently overturned,[644] it does not address the general issue of reinstatement following service as a member of Parliament.

Notwithstanding that candidacy is the only issue covered by legislation, it is clear that the State Services Commission has taken the position that the political neutrality of a public servant is a constitutional necessity. This view was communicated in a management leaflet, which was distributed in June, 1983.[645] Public servants were advised that they "must not allow personal interests (political, financial, ideological or family) to conflict with professional obligations", which were, in essence, "[to] serve the Minister loyally and in an entirely professional manner".[646] In light of this enjoinder, becoming involved in political activity would seem to entail a risk of discipline. Section 56 of the *State Services Act 1962*[647] defines various "offences" for which the State Services Commission may impose one or more penalties, including dismissal.[648] Certain of these offences are drawn in sufficiently broad terms to comprehend political activity.[649]

(b) CONFIDENTIALITY

It would appear that no statutory provisions deal specifically with disclosure of information by government employees. However, an employee who releases information without prior authorization may be charged with having committed a disciplinary offence under the *State Services Act 1962* on the ground that such release constitutes "improper conduct in his official capacity".[650]

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[641] *Ibid.*, s. 30(5).

[642] *Ibid.*, s. 30(6).

[643] *Ibid.*, s. 31(2), as en. by 1981, No. 120, s. 11(1).

[644] *Electoral Act 1956*, *supra*, note 637, s. 30(3)-(6).

[645] See Management Leaflet, *supra*, note 636.

[646] *Ibid.*, at 2.

[647] *State Services Act 1962*, 1962, No. 132.

[648] *Ibid.*, s. 58(6).

[649] For example, s. 56(i) provides that "[e]very employee commits an offence against this Act who ... [i]s guilty of any improper conduct in his official capacity, or of any other improper conduct which affects adversely the performance of his duties or brings the Public Service into disrepute".

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[650] See, also, s. 56(g), as en. by 1982, No. 3, s. 2, which prohibits an employee from "[i]mproperly [using] for private purposes any information acquired by him as an employee of the Public Service".

CHAPTER 5

THE CASE FOR REFORM

In chapter 2 of this Report, we dealt with the importance of a politically neutral government service to the political health of a democratic society, and set out the precepts of the traditional doctrine of neutrality. Our concern in this chapter is to propose a rationale for reform without abandoning the central principle that the public interest is best served by a government service that is seen to be institutionally separate from partisan political interests, and that can effectively serve a government of any political stripe without disruption or dissention.

The precepts of political neutrality establish an ideal, a model designed to protect certain institutional interests at the cost of the rights and freedoms of the government employees affected. In modern times, the model has never been applied in its ideal form in a democracy; the cost in loss of personal liberty would have been too great. The balance between the doctrine of political neutrality and individual rights and freedoms has always been struck with a view to the preservation of the central interests on each side of the balance. We turn here to our own attempt to redefine what interests are central, and how best that balance can be struck.

If the concept of political neutrality for the government service is to be preserved, four vital principles must, in the Commission's view, be protected by any scheme that we recommend. Those principles express the legitimate demands, and rights, that the government of the day, the public at large, individual Crown employees and members of the public seeking to enter government service ought to be able to impose upon the government service structure in a democracy.

First, the government of the day must be assured that it can receive loyal advice on policy matters, and loyal implementation of the policy choices selected, from the government service institution. Because governments change, not only the government party of the moment but also the opposition parties have a demonstrable interest in preserving this institutional integrity. Whatever may be the political views of individual public servants, therefore, it is essential that the public service as an institution function smoothly and disinterestedly through political controversy, political evolution and political change.

Perhaps the most ringing exposition of this principle, which is the essence of the doctrine of political neutrality, is found in the judgment of Douglas J. of the United States Supreme Court in *United Public Workers of America v. Mitchell*:[1]

> The civil service system has been called 'the one great political invention' of nineteenth century democracy. The intricacies of modern government, the important and manifold tasks it performs, the skill and expertise required, the vast discretionary powers vested in the various agencies, and the impact of their work on individual claimants as well as on the general welfare have made the integrity, devotion, and skill of the men and women who compose the system a matter of deep concern of many thoughtful people. Political fortunes of parties will ebb and flow; top policy men and administrations will come and go; new laws will be passed and old ones amended or repealed. But those who give continuity to administration, those who contribute the basic skill and efficiency to the daily work of government, and those on whom the new as well as the old administration is dependent for smooth functioning of the complicated machinery of modern government are the core of the civil service. If they are beneficiaries of political patronage rather than professional careerists, serious results might follow — or so Congress could reasonably believe. Public confidence in the objectivity and integrity of the civil service system might be so weakened as to jeopardize the effectiveness of administrative government. Or it might founder on the rocks of incompetency, if every change in political fortunes turned out the incumbents, broke the continuity of administration, and thus interfered with the development of expert management at the technical levels. Or if the incumbents were political adventurers or party workers, partisanship might color or corrupt the processes of administration of law with which most of the administrative agencies are entrusted.
>
> The philosophy is to develop a civil service which can and will serve loyally and equally well any political party which comes into power.

The second principle, which also follows from the words of Douglas J., is that the public at large must be assured of fair and unbiased treatment in all dealings with the government service. This will be particularly true where the person representing the government service is given authority to make decisions affecting the vital interests of the citizen. Where these decisions are adjudicative as between citizen and citizen or citizen and government, allocative of public goods among citizens, or evaluative of some attribute or performance of the citizen, the necessity for fairness, and for the perception of fairness, becomes even more acute. Governments make more and more decisions affecting the interests of citizens, and it is essential to the social fabric that those decisions be fair, and be seen to be fair, by those whose interests are at stake.

Third, Crown employees must be protected from coercion in respect of political activity. Any reforms designed to permit Crown employees to engage in political activity of their choice must equally permit them to abstain entirely from political activity. There will always be a temptation, among those who have employment preference to offer, to use that preference as a means of conscripting as political workers those in whose favour it might be exercised. That temptation must be carefully restrained by restrictions on any kind of coercive political influence on the part of either politicians or superiors in the government service.

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[1] 330 U.S. 75, at 121-22, 67 S. Ct. 556, at 580 (1947).

Finally, there must be equal access for all qualified applicants to government service employment; the practice of political patronage at the entry level must be suppressed, or at least not permitted to proliferate further, and public service employment must be based upon a stable, career-oriented status where merit is the governing principle for both entry and advancement.

It is important to note that, of the many briefs and submissions we received attacking the current state of the law in Ontario, none seriously questioned the vital importance of the concept of a politically neutral government service. Indeed, many of our respondents stressed the importance of maintaining the merit principle and the concept of political neutrality, while arguing that even so vital an aspect of the public interest did not require the stringent measures imposed by the current law. Rather, the criticisms that we heard were directed to the responsiveness of the means chosen to the ends to be achieved. There was no significant disagreement that those ends should include the furtherance of the four principles that we have set out above.

The criticisms of the current law are that it is overbroad in two dimensions. First, it is argued that the restrictions on political activity and free speech found in the *Public Service Act*[2] affect far more Crown employees than is necessary to achieve the purposes at which they are aimed. Second, it is argued that the restrictions catch a much broader range of activity, particularly in the area of public expression, than is necessary to preserve the public interest.[3] The argument is, therefore, that the current law fails to strike the correct balance between the importance of the ends to be achieved and the intrusiveness of the means to be employed in the attainment of those objectives.

A further criticism of the current law is that it is unnecessarily vague in many of its aspects. While the use of general language in statutory provisions is probably unavoidable, a number of respondents pointed out that those who are bound by the present law often have a great deal of difficulty in determining their rights and obligations from the statutory language. Because such language must always be interpreted in the light of each set of circumstances, there is a strong chance that employees will be disciplined for conduct that is only determined to be culpable *ex post facto*, in the course of disciplinary proceedings. There is thus a chilling effect on legitimate activities of Crown employees, since they must often act at their peril in exercising rights that other citizens take for granted.

Finally, a number of critics point to anomalies in the law that render it unfair and illogical. Employees performing very similar jobs are often treated differently in respect of political activity, on the basis of their status as Crown employees or civil servants.[4] Moreover, while there are stringent restrictions applicable to even relatively minor political involvement by many Crown employees, those same Crown employees may engage in the most public and committed form of political activity — candidacy in an election — merely by taking a short leave of absence.[5] Whatever damage is feared from the political activity proscribed by the legislation must result in far greater measure from standing as a candidate; yet the unsuccessful candidate is permitted to return to Crown employment as if the damage were irrelevant to his or her future effectiveness.

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[2] R.S.O. 1980, c. 418.

[3] See, for example, Ontario Public Service Employees Union, *Submissions to the Ontario Law Reform Commission relating to Public Employees Freedom of Expression* (February 18, 1986, Revised February 25, 1986), at 10.

[4] For example, while s. 13(1) of the *Public Service Act*, *supra*, note 2, prohibits "civil

The task of assessing the current balance, and if necessary striking a more acceptable balance, therefore falls to the Commission. We think we should observe at this juncture that the balancing exercise that we are required to perform is not susceptible of scientific accuracy. There is really no method to measure the impact that a particular amendment will have upon the overall behaviour of so large and diverse an organization as the Ontario public service. It is a question of judgment whether a particular reform will ease the undue restrictions on individual freedom without a deleterious effect upon the principles of political neutrality. Our judgment, informed by the judgment of our advisors and the submissions made to us by the various parties who appeared at our public hearings, suggests that there are valid arguments for reducing the restrictiveness of the current law and, at least to some extent, providing affirmative protections for Crown employees engaged in certain kinds of activity. We shall review these arguments in order to provide a context for the specific recommendations that we propose in chapter 6.

The first factor that we think is important is that, at least to the vast majority of citizens, the government service appears as an institution, rather than as individual human faces. While there may be circumstances in smaller communities where a particularly influential Crown employee is well known to those with whom he or she deals among the public, so that the employee's political views, or even his or her religion, social connections or family relationships, become identified with the public personality of the government service in that community, we think it is much more likely to be the case that Crown employees are essentially anonymous to the public.

It will also be rare that a single Crown employee will be solely responsible for a decision affecting a citizen; even where the final discretion is exercised by one such Crown employee, it will have to be exercised in accordance with established rules and procedures, and may be subject either to review by a higher authority or to an appeal. Where the decision is only one of a series, it is also unlikely that every decision in the series will be made by the same individual. Finally, in most circumstances it would be entirely fortuitous that

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servants" from canvassing during a provincial or federal election on behalf of a candidate, Crown employees who are not civil servants are not subject to any statutory limitation and can canvass at any time.

Similarly, only "civil servants" are subject to the very broad restrictions on freedom of expression contained in s. 14 of the Act.

[5] *Public Service Act*, *supra*, note 2, s. 12(1)(a) and (2).

the citizen, faced with an identifiable decision-maker, would know anything about the personal predilections of that single Crown employee, and in particular would have any knowledge of that employee's political activity or allegiance.

For these reasons, we think that the current law is in error to the extent that it is directed to the personal political neutrality of individual Crown employees, rather than to the institutional neutrality of the government service. In our view, only a relatively small proportion of Crown employees are sufficiently influential to be able to put the stamp of their political views on the institution within which they operate; for the vast majority of Crown employees, their political views are irrelevant to the directions that the government will take, and they are therefore of little concern to those who would protect the principle of political neutrality as applied at the institutional level.

This is not to say, of course, that the political allegiances of a Crown employee will never come to the attention of members of the public, nor that they will never be relevant to the nature of the interaction of that member of the public with the Crown employee. As we shall note below, it is important to be able to identify the kinds of circumstances in which political activity becomes relevant to a Crown employee's performance of his or her duties. But the fact that some employees who deal with the public may occasionally encounter circumstances in which their political allegiance will become an issue can hardly argue for the blanket exclusion of all such employees from any political activity. In our recommendations, therefore, we have tried to concentrate instead on the particular harm to be avoided, and we have attempted to shape our recommendations to prevent that harm with as little unnecessary damage to individual freedoms as is possible.

This leads us to a second consideration. The modern government service varies widely in functional responsibilities. Persons who are now covered by the *Public Service Act* restrictions are engaged in providing a wide range of services to the public, including commercial, financial, informational and industrial functions, as well as the more traditional policy articulation and implementation. Many of the functions carried out by Crown employees are such that, no matter how well known the political views of the Crown employee might be to those with whom he or she comes in contact, no one could credibly assert that those political allegiances are in any way a barrier to the provision of an efficient and acceptable service to the public. Even if a citizen knows the political stripe of the person who sells wine and spirits, or clears snow from the highway, or operates a word processor, there is little rational cause for any member of the public to think that the service thus being performed is in any way affected by those political leanings.

We recognize that the public perception of the political neutrality of the government service is a centerpiece of many of the arguments for retaining stringent restrictions on political activity.[6] We think, however, that before so subjective a factor as public perception should be invoked to justify blanket restrictions on the individual freedom of Crown employees, there should be some demonstration of the rationality of the perception. It is our view that, even if a perception of political involvement by Crown employees engaged in tasks with no political sensitivity whatsoever were soundly based, it would nevertheless be irrelevant to a rational public judgment whether the public interest was still being properly served.

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[6] See, for example, Gallant, "Service Above Party" (1986), 7 Policy Options Politiques, No. 2, 8, at 8-9.

While the current law does recognize, to a certain degree, that more stringent restrictions are appropriate for Crown employees in more sensitive positions, we think there is a strong argument for loosening still further the restrictions on the broad range of employees who perform functions that have no political sensitivity whatsoever.

The third factor to be considered as an argument for reform is that, even were complete political freedom to be accorded to Crown employees, the government service is unlikely to prove to be politically monolithic. There is no reason to think that support for each of the various political parties, and indeed abstention from support of any political party, would not be present in the government service to about the same extent as it is in the general population. Indeed, there is at least some reason to think that Crown employees may prove to be less forthcoming about open support of a political party than other citizens, particularly those employees who have ambitions for promotion to the ranks of the government service where political sensitivity does become an issue and where political neutrality may be perceived as an important factor for success.

The inevitable political fragmentation of the government service seems likely to produce a political inertia. In the absence of an overwhelming partisan control over Crown employees, it seems likely that there will exist informal and interpersonal checks and balances that will render it unprofitable for any particular Crown employee to forward the aims of his or her party at the expense of the others. In this regard, what is much more important than the political predilections of persons who have already become Crown employees, is the reliability of the mechanisms used to ensure that there is political impartiality in the selection of Crown employees at the entry level.

In addition to these distributional checks and balances, there are also procedural and institutional checks and balances already in place in the government service to ensure that political partisanship is not a factor in employment decision-making. The merit system is firmly in place in Ontario and, whatever may be its imperfections, it provides an objective standard against which all employment decisions, from performance evaluation to promotion to discipline and discharge, are to be made. There are rights of appeal or grievance available to virtually all public servants, and the possibility of adjudication before an impartial and independent tribunal.[7]

It would, of course, be naive to suggest that it is possible to stamp out all consideration in employment decisions of a strongly expressed political adherence. Many of the decisions that are made affecting the career of a Crown employee of necessity contain a substantial discretionary element, and adjudicators have been reluctant to substitute their discretion for that of the person making the decision, except where there is a clear demonstration that the discretion has been exercised on inadmissible grounds. With such an element of subjectivity inherent in employment, there will always remain scope for abuse. It is, however, possible to minimize that scope, and to insist upon the reliance on objective factors to the greatest degree possible; this is what the current version of the merit principle in Ontario does, and that system should be protected and enhanced.

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[7] These avenues of redress are described *supra*, ch. 1, sec. 3.

But the possibility that people who publicly display strong political views, or indeed strong views of any kind, might be discriminated against because of those views can scarcely argue for a suppression of those views. It is surely adding insult to injury to restrict a Crown employee's rights and freedoms for the purpose of protecting the Crown employee from discrimination that may arise out of the free exercise of those rights and freedoms.

Continuing from this point, it is of significance that the one place where there now exists no control whatsoever on political activity is among would-be candidates for government employment. To whatever extent the merit principle for initial appointments is abandoned, and the appointment process is placed in the hands of the political authorities, the possibility of political patronage at the entry level will remain unabated. But this hardly argues for restrictions on political activity by persons who have already become public servants; if the merit system is vulnerable anywhere, it is at the level where political activity prior to appointment has been a factor. Indeed, if one reviews the public criticism, in the press and elsewhere, of political patronage in Canada in recent years, it appears that it almost invariably relates not to preferences given to serving Crown employees, but rather to hiring and appointment practices based upon political activity outside the government service. There is therefore a strong case that, at least as the Ontario public service is now organized, the restrictions on political activities by serving Crown employees make very little real difference to the prevalance of political patronage.

Finally, it is a telling argument that the balance between the personal freedom of individual Crown employees and the institutional neutrality of the government service has been struck much differently in other jurisdictions. While it is obvious that Ontario is by no means the most Draconian of jurisdictions in respect of political restrictions, neither is it the most liberal. In a number of other jurisdictions, even in provinces of Canada very similar in political and economic structure to Ontario, much more relaxed schemes of restrictions on political activity do not appear to have resulted in catastrophe.

These arguments, taken together, suggest that Ontario could do with fewer controls than are exerted by the current legislation. To protect the vital interests that we have identified, it is not necessary to restrict so broad a group of employees from so many different kinds of political activities. Indeed, some of the interests that we would protect are most probably better protected by controls other than restrictions on political activity. This is particularly the case in respect of the suppression of political patronage, which seems likely to be better dealt with by a strengthening of the merit system in order to strike at the disease rather than merely to suppress the symptoms.

The approach that we have therefore adopted in formulating the recommendations that follow has been to identify the harm to the protected principles that is to be prevented, and to seek a specific remedy for the damage that would otherwise be caused. The result of this approach is, we believe, a far more surgical response than has been recommended by any of the earlier formal studies on political activity by government employees; and although the outcome of our deliberations may closely resemble the current situation in the United Kingdom,[8] there are significant differences that, in our view, make it easier to justify the necessary intrusions on the fundamental freedoms of the employees affected.

In particular, as will be discussed in chapter 6, we have tried to tailor the restrictions on political activity to the kind of activity and the contextual circumstances for the activity that will lead to the perceived harm. This may mean that some Crown employees will have to restrict their political activity in order to avoid certain consequences, but in our view that is a more responsive approach than removing a broad range of political rights from Crown employees merely because the exercise of those rights in some circumstances or in some ways by some Crown employees may cause damage to the public interest.

We turn finally to the effect of the *Canadian Charter of Rights and Freedoms*[9] upon our deliberations. It will be recalled that our terms of reference require us to have regard to the effect of the Charter upon the matters sent to us for consideration. At this stage of the development of Charter jurisprudence, however, it seems prudent to recognize that there are many aspects of the influence of the Charter that are as yet not clearly defined, and on which we can expect our courts to engage in a slow process of elaboration over the years. An authoritative statement of what the Charter requires in respect of political activity by government employees is not ours to provide, and our approach therefore has been to look to the spirit of the Charter rather than to its detail in considering how it should affect our deliberations.

Our discussion of the Charter in chapter 3 of the Report[10] makes it clear to us that, whatever might be the ultimate outcome of litigation involving any particular set of restrictions on political activity by government employees, there exist substantial grounds for a challenge against such restrictions under section 2, and possibly other sections, of the Charter. It seems likely that most

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[8] For a description of the U.K. solution, see *supra*, ch. 4, sec. 3(a)(v).

[9] Being Part I of the *Constitution Act, 1982*, which is Schedule B of the *Canada Act 1982*, c. 11 (U.K.), as am. by the Constitution Amendment Proclamation, 1983, SI/84-102, effective June 21, 1984.

[10] *Supra*, ch. 3, sec. 4.

aspects of the current restrictions in Ontario would be found to be *prima facie* infringements on the freedom of association or the freedom of thought, belief, opinion and expression of the Crown employees affected, and to that extent the constitutional validity of those provisions would thus depend upon a showing by the Crown of justification in accordance with the provisions of section 1 of the Charter. We must, therefore, face squarely the implications of the fact that we are dealing with limitations on the constitutionally protected rights and freedoms of a large segment of the work force. Whatever we recommend, short of a total abandonment of the restrictions, will fall under the scrutiny of the Charter.

It may be that at least some of the current restrictions on political activity could be justified in accordance with the principles established by the Supreme Court of Canada in *R. v. Oakes*.[11] This would require, however, the creation of an *ex post facto* justification for provisions enacted nearly 25 years ago. Moreover, that justification would have to demonstrate that the restrictions remain valid in the context of dramatic changes in the structure of government service and the range of activities contemplated in government service, as well as the significant social and political changes of a quarter century. While we cannot deny that a successful justification could be mounted, we must conclude that our consideration of this problem and the factors discussed immediately above does not suggest to us the basis on which such a justification could be made for each and every part of the current restrictions. In particular, we would find it very difficult indeed to justify the sweeping restrictions on freedom of expression set out in section 14 of the *Public Service Act*, particularly in light of the judgment of the Supreme Court of Canada in the *Fraser* case.[12] At the very least, we must conclude that the outcome of a Charter challenge to the present provisions of the *Public Service Act* would be in some doubt.

The approach that we have taken, therefore, has been to attempt to structure our recommendations in light of the requirements of the Charter, recognizing that most of our recommendations will indeed constitute *prima facie* restrictions on fundamental freedoms for the government employees affected. We have thus attempted, in formulating our recommendations, to bear in mind the imperatives of section 1. To the greatest extent possible, we have attempted to provide for certainty in the form of a statutory structure for our recommendations, so that the requirement that limitations on guaranteed freedoms be "prescribed by law" can be met.

In addition, we have attempted to explain all our recommendations by reference to "a form of proportionality test".[13] We have attempted to define the objective that the restrictions that we propose are designed to protect, and to explain the elements of each objective and the harms to be prevented as explicitly as is possible, having regard to the necessarily speculative nature of the exercise of predicting the consequences of any particular measure. We have further attempted to identify means that are rationally connected to the interests to be protected, and that interfere as little as possible, consistent with the protection of the vital interests concerned, with the guaranteed rights and freedoms that are necessarily infringed upon. In all this, our approach has been to try to strike a balance of proportionality between the end to be achieved and the means employed in its achievement.

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[11] (1986), 65 N.R. 87. See discussion *supra*, ch. 3, sec. 4(e).

[12] *Re Fraser and Public Service Staff Relations Board* (1985), 23 D.L.R. (4th) 122, aff'ing [1983] 1 F.C. 372, (1982), 142 D.L.R. (3d) 708 (C.A.), aff'ing (1983), 5 L.A.C. (3d) 193 (P.S.S.R.B., Kates). See discussion *supra*, ch. 3, sec. 2(b)(ii).

[13] *R. v. Oakes*, *supra*, note 11, at 129. See discussion *supra*, ch. 3, sec. 4(e).

While, of course, there will be scope for reasonable people to disagree concerning the conclusions we derive from this approach, what we have attempted to provide is a series of recommendations explained in such a fashion as to constitute a ready-made justification, within the standards of section 1, for the *prima facie* infringements on guaranteed rights that we propose. This is, in our view, a far more fruitful approach than attempting an unofficial interpretation of the Charter itself. The Charter has therefore been in the nature of illumination for us, rather than a strict code to be interpreted, applied and followed.

It is our hope that this approach will give our recommendations a life independent of any particular view of what the Charter may strictly require, which would be, of necessity, speculative and subject to the authoritative articulation of Charter jurisprudence in the courts. It is also our view that this approach is what the spirit of the Charter requires; those who recommend the imposition of restrictions on constitutional guarantees take on a heavy obligation to justify those restrictions.

This is also, we observe, an exercise that has never been attempted before. There have been only two other formal Canadian studies of this issue, and both of them were in the context of a much broader range of concerns. The first, by the Special Committee on the Review of Personnel Management and the Merit Principle[14] which reported in 1979, did not have to deal with the constraints of the *Canadian Charter of Rights and Freedoms*, and essentially adapted to Canadian use the recommendations of the United Kingdom Committee on Political Activities of Civil Servants,[15] which had reported the previous year.

While the 1985 Report of the Parliamentary Committee on Equality Rights[16] dealt with political restrictions in the federal public service in light of the Charter, and in particular in light of the section 15 guarantees of equality before and under the law, it disposed of the issue of political rights of public servants in less than a page, and proposed simply that the federal legislation be amended "to ensure that no greater limitations are imposed on the political rights of public servants than are necessary to maintain a politically neutral public service". We thus venture into uncharted territory.

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[14] Canada, *Report of the Special Committee on the review of Personnel Management and the Merit Principle* (1979), at 171-75.

[15] United Kingdom, *Committee on Political Activities of Civil Servants* (Cmnd. 7057, 1978), discussed *supra*, ch. 4, sec. 3(a)(iv).

[16] Canada, *Report of the Parliamentary Committee on Equality Rights: Equality for All* (1985), at 126-27.

CHAPTER 6

RECOMMENDATIONS FOR REFORM

1. GENERAL INTRODUCTION

As we have set out in chapter 5, in our discussion of the factors arguing for and against reform of the law relating to political activity and critical comment by Crown employees, an attempt must be made to accommodate, on the one hand, the public interest in an efficient, credible, and politically neutral public service, and, on the other hand, the individual rights of the employees who staff that public service. Given the importance of the personal rights involved, and the impact of the *Canadian Charter of Rights and Freedom*,[1] we think that the only restrictions that can be justified are those that are reasonably necessary to protect the public interest, and that every encroachment on individual rights and freedoms must be justified by reference to a vital element of the public interest that would be directly served by such encroachment.

In coming to our recommendations, we have made certain general assumptions. As a contextual assumption, we have generally taken the law that pertains to the issues before us as it was on the date of this Reference. The one major exception to this assumption relates to freedom of information legislation. Such legislation will almost certainly be enacted in the Province of Ontario in the near future, thus crystallizing the legislative intention concerning the extent to which the public should have access to government information and the procedures by which such access may be gained. There has now been introduced in the Legislative Assembly the *Freedom of Information and Protection of Individual Privacy Act, 1986*.[2] We have simply assumed that legislation along these lines will ultimately be passed.[3] As will be seen below, our recommendations are designed to work with whatever legislation of this type is enacted; we do not attempt in this Report to offer any proposals respecting the content of that legislation. On the other hand, if no such legislation is passed, and the subject of public access to government information remains unresolved, some of our recommendations may have to be reconsidered.

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[1] Being Part I of the *Constitution Act, 1982*, which is Schedule B of the *Canada Act 1982*, c. 11 (U.K.), as am. by the Constitution Amendment Proclamation, 1983, SI/84-102, effective June 21, 1984.

[2] *Freedom of Information and Protection of Individual Privacy Act, 1986*, Bill 34, 1986 (33d Leg. 2d Sess.).

[3] For a discussion of the proposed legislation, see *supra*, ch. 3, sec. 3(b)(i)d. and *infra*, this ch., sec. 7(c). The relevance of the legislation is in respect of the law that should govern the disclosure of government information by Crown employees. See *infra*, this ch., secs. 7(d)(ii) and 7(e)(iv).

Based on these general assumptions, we wish to make three major structural recommendations, each of which will be elaborated in respect of the substantive recommendations made throughout this chapter. These structural recommendations relate to the continuation and expansion of the adjudicative role of the quasi-judicial appeal tribunals that now exist to resolve grievances by Crown employees; the designation of those Crown employees to whom our recommendations are intended to apply; and the establishment of the Office of Special Counsel, an administrative official who will act as an advisor to individual Crown employees and whose relationship with such employees will be that of solicitor and client, but who will also be required to perform certain specific public functions that are more than purely advisory in nature.

Our first general recommendation is for an expansion of the jurisdiction of the two appeal boards created for Crown employees who are respectively members of, or excluded from, the bargaining units created under the *Crown Employees Collective Bargaining Act*.[4] Legislation implementing a number of the specific recommendations that we make below will inevitably give rise from time to time to disputes between individual employees, or groups of employees, and the government or relevant government agency concerning the application of the legislative provisions to a particular situation or set of circumstances. Accordingly, we recommend that, for employees covered by the *Crown Employees Collective Bargaining Act*, there should be a statutory right of arbitration before the Grievance Settlement Board concerning issues relating to political activity, critical comment, and the disclosure of government information. The particular kinds of issue to be subject to this form of adjudication will be set out in detail below; however, we recommend that the proposed right of arbitration should not depend upon the provisions of any collective agreement, but should be an independent right much like the current right to arbitration in respect of discipline, classification, and evaluation grievances.[5] Similarly, we recommend that a parallel statutory right of arbitration before the Public Service Grievance Board should be available to Crown employees who are not covered by the *Crown Employees Collective Bargaining Act*.

In order to ensure that employees who become involved in disputes relating to the proposed rules governing political activity, critical comment, and disclosure of information have a right to binding adjudication of such disputes, some expansion of the jurisdiction of the two appeal boards will be necessary. In particular, we recommend that all Crown employees to be affected by our recommendations[6] should have access to the Grievance Settlement Board or the Public Service Grievance Board, as the case may be, in order to determine any issues relating to the interpretation of the proposed rules. This right of access should be available whether or not disciplinary proceedings are involved.[7] In addition, all Crown employees who are entitled at present to bring a grievance in relation to a dismissal should be entitled to grieve any disciplinary action arising from the application of the proposed rules.[8]

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[4] R.S.O. 1980, c. 108. The structure of the adjudicative tribunals is described *supra*, ch. 1, sec. 3.

[5] As set out in the *Crown Employees Collective Bargaining Act*, *supra*, note 4, s. 18(2).

The second structural recommendation that we think should be made relates to those persons to be subject to the proposed rules relating to political activity, critical comment, and the disclosure of government information. While our terms of reference require us to make recommendations relating to "Crown employees", that expression has a very broad reach indeed. Although only Crown agencies included under Schedule I of the Manual of Administration have their employees appointed under the *Public Service Act*,[9] the definition of Crown employees is wide enough to cover employees of all Crown agencies. Despite a recent reduction in the number of Crown agencies by amendments to the Manual of Administration,[10] it is our view that there remain a number of agencies that are so autonomous in operation and so different in nature from the public service itself that they ought to have the right to set their own rules for their employees, rules shaped to the particular nature of the employment under these bodies.

One example will suffice. The Colleges of Applied Arts and Technology are Crown agencies included in Schedule III of the Manual of Administration, and their employees are, therefore, apparently covered by the current restrictions. The colleges, however, appoint their own employees according to their own procedures and criteria, and bargain with those employees under legislation entirely separate from that applicable to the public service. The terms and conditions of employment for those employees, moreover, are very different from those applicable to all other Crown employees. For example, they include an element of academic freedom for members of the teaching staff that could argue for very different treatment of those employees for the purposes of restrictions on political activity and critical comment.

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[6] With respect to the persons to be subject to the proposed rules governing political activity, critical comment, and the disclosure of government information, see the discussion concerning our second structural recommendation, *infra*, this sec.

[7] One of the submissions received by the Commission referred to an employee who had been nominated for local municipal office. Objection to such political activity was taken, due to an alleged conflict of interest, pursuant to s. 11(b) of the *Public Service Act*, R.S.O. 1980, c. 418. The employee was permitted to continue working, upon agreeing not to campaign, and not to serve if elected. The employee, however, had no right to pursue a grievance in this matter, since there had been no violation of the collective agreement. Implementation of our recommendation would permit arbitration in such circumstances.

[8] A description of the limitations on the grievance rights of Crown employees is set out *supra*, ch. 1, sec. 3. We recognize that there will be a number of Crown employees for whom full access for all purposes to the appeal boards will be unavailable. Some Crown employees, such as members of agencies, boards, and commissions, are appointed by Order-in-Council under statutory conditions. Their appointment is for a fixed term, or at the pleasure of the Crown, or during good behaviour. For these employees, access to the appeal boards in respect of disciplinary matters is inappropriate, but access for interpretive purposes remains important to the operation of our proposed scheme.

[9] *Supra*, note 7.

[10] On May 6, 1986, the Management Board of Cabinet approved amendments to the Manual of Administration that, among other things, amended the definition of an Ontario government agency to include only those entities, otherwise within the definition, to which a majority of members is appointed by the government. Accordingly, excluded from the definition, since May 6, 1986, are those entities to which the government appoints less than a majority of members.

Accordingly, we recommend that, as part of the process of amending the law, a careful study should be made of all Crown agencies, with a view to identifying those agencies that serve the Crown in capacities so dissimilar to the public service itself as to justify the exclusion of their employees from the rules to be proposed in relation to political activity, critical comment, and disclosure of information. The rules to be proposed should apply, therefore, to all persons now included within the definition of "Crown employee" under the *Public Service Act*, as well as employees of Ontario Hydro and the Ontario Northland Transportation Commission,[11] except for employees of those agencies, including the latter two, identified for exclusion pursuant to the review recommended above, and except for members of the Ontario Provincial Police, discussed later in this section.

As a third structural recommendation, we recommend the creation of the Office of Special Counsel. As will be seen, the main function of the Special Counsel will be in relation to our recommendations on "whistleblowing", that is, the disclosure by Crown employees of government information allegedly evidencing government wrongdoing, where that disclosure is in the public interest.[12] We also see the value, however, of an advisor for individual Crown employees, who is independent completely of the government structure, and who is able to offer Crown employees advice on the operation of the proposed system of rules in an atmosphere of confidentiality. While we have assigned certain public duties to the Special Counsel, we do not see the role of this office as an adjudicative or investigative one. We therefore contemplate no conflict between the role of the Special Counsel and the role of the adjudicative tribunals whose jurisdiction we have discussed above. Rather, we see the Special Counsel as an advisor to Crown employees who wish to clarify their obligations and rights under the proposed rules on political activity, critical comment, and disclosure of information, and as a buffer between Crown employees and the government in the context of whistleblowing. In order for Crown employees to be assured that confidentiality will be respected when they resort to the Special Counsel, we recommend that solicitor-client privilege should apply to all communications between the Special Counsel and Crown employees.

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[11] The employees of these two agencies are now excluded from the definition of "Crown employee" under the *Public Service Act*, *supra*, note 7, s. 1(e).

[12] See *infra*, this ch., sec. 7(e).

We further recommend that the Special Counsel should be appointed by the Lieutenant Governor in Council on the address of the Legislative Assembly. The Special Counsel would, then, be an officer of the Legislature, reporting to, and funded by, the Legislature much as the Office of the Ombudsman now is. We shall elaborate below, however, on the role that we envisage for the Special Counsel, a role that is very different from that of the Ombudsman.[13]

The three structural recommendations proposed above set the limits of the application of the new rules on political activity, critical comment, and disclosure of information to be recommended in this chapter. They also define the institutional structure within which these rules are to be interpreted and applied, and in which disputes arising from the operation of these rules may be authoritatively resolved.

We have one final preliminary recommendation to make, which is, in our view, vital to the success of the entire scheme we are proposing. As we have observed, a great deal of the institutional political neutrality of the government service depends not upon restrictions on political activity and critical comment by individual Crown employees, but upon the successful operation of the merit system. Without the merit system, favouritism of all kinds, including political patronage, becomes possible. Human nature has been known in the past, and will undoubtedly operate in the future, to introduce political considerations into employment decisions where the controls on such improper conduct are weakened.

We think it is essential that the merit system be preserved, and we therefore recommend redoubled vigilance to guarantee that appointments, promotions, and evaluations take place under guidelines that ensure that only proper considerations will be taken into account, and that political allegiances will be grounds neither for preference nor for discrimination. Our proposals will permit Crown employees much greater latitude to identify themselves with political parties or causes; they will thereby become more vulnerable to improper treatment. Only a carefully constructed and properly maintained merit system can ensure that they can expect to exercise their fundamental freedoms without suffering employment consequences.

2. CATEGORIZATION OF CROWN EMPLOYEES FOR THE PURPOSE OF RESTRICTIONS ON POLITICAL ACTIVITY AND CRITICAL COMMENT

(a) INTRODUCTION

We turn now to the complex question of how to identify those Crown employees who must be subject to some type of political restriction in order to protect the public interest in the political neutrality of the public service. This problem is a difficult one not only because of the diversity of Crown employment in Ontario, but also because the models available in other jurisdictions vary widely.

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[13] With respect to the differences between these two officials, see *infra*, this ch., sec. 7(e)(iv).

We have come to the conclusion that, as virtually every respondent at our public hearings has told us, the present division of Crown employment based on one's status as a "Crown employee", "public servant", or "civil servant" is an outdated and now essentially meaningless method of organization for the purpose of dealing with restrictions on political activity and critical comment.[14] It appears that this categorization has become less and less important over the years,[15] and there has been a trend in recent times to classify as many unclassified public service jobs as possible, thus making them a part of the civil service.[16] Moreover, even where there has been no such assimilation, people in different categories often work at identical jobs, sometimes even in the same workplace. In our view, any restrictions to be imposed upon employees should be based on their actual job duties and not on the technical status of their relationship to the Crown as employees. While it may once have been the case that employment status was a sufficient indication of job duties or responsibilities to justify differential treatment for the purpose of controls on political activity and critical comment, that is no longer the case.

We have also come to the conclusion that, at least for the most part, it is not desirable to rely upon classifications or job titles as a mechanism for identifying Crown employees who ought to be subject to restrictions on political activity and critical comment. While some job titles clearly and unambiguously connote duties that are relevant to the question of such restrictions, and while some classification grades at senior executive levels may also convey relevant information, in general it is not possible to tell precisely what a Crown employee does from either a job title or a classification. Detailed information about the duties, contacts, and responsibilities of a Crown employee can only come from the "position specification", or job description, that is prepared for each position. The duties set out in a position specification are, however, fluid; new duties may be assigned and old duties may be discontinued, and the written position specification may or may not reflect such changes with any accuracy.

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[14] The written submissions received by the Commission contained many examples demonstrating graphically how individuals, performing essentially identical job functions, may be categorized differently and, accordingly, may be subject to different political restrictions. The submissions also referred to a number of instances in which a transfer of authority with respect to certain governmental institutions occurred between the provincial government and a municipal government. Employees in one category before the transfer found themselves in a different category after the transfer, notwithstanding the fact that they continued to perform precisely the same job function.

[15] The amendments to the *Public Service Superannuation Act*, R.S.O. 1980, c. 419, enacted by S.O. 1984, c. 22, considerably reduced the distinction between the classified and unclassified service by permitting certain members of the latter to become contributors to the superannuation fund. Provisions extending other benefits, previously limited to the classified service, to many public servants were included in the 1984-86 Working Conditions and Employee Benefits Collective Agreement. This process was completed by amendments to the regulations under the *Public Service Act*, *supra*, note 7: see O. Reg. 24/86.

[16] The recent amendments to the regulations under the *Public Service Act*, *supra*, note 7, provide for the classification of certain hitherto unclassified part-time and seasonal employees: see O. Reg. 24/86.

We recognize that it has been common in several jurisdictions to identify members of a restricted category of government employees by reference to the classification system. For example, the approach in the United Kingdom is to define three classes for the purposes of political activity, based entirely upon the occupational group to which the positions are assigned.[17] A similar approach has been recommended for the Canadian federal public service.[18] Both systems, however, share a difficulty that we would prefer to avoid, namely, the necessity for members of the intermediate group to apply for prior permission to engage in political activity or critical comment, and the necessity for a case-by-case determination whether a member of the intermediate class is or is not to be restricted.

We would prefer to avoid the "prior restraint" aspect of this type of system, and the monumental task by some administrative agency of resolving who will or will not be restricted. The need to obtain prior permission seems likely to create a chilling effect, since an employee in the intermediate group is required to signal a desire to become politically active in order to have his or her rights to do so determined.[19] If the employee is, in fact, not to be politically restricted, there will have to be unnecessary disclosure of information to his or her superiors about political affiliations that the employee might prefer to keep private. Worse still, if the employee is to be politically restricted, he or she will have abandoned the very shield of political neutrality, in the process of applying for permission, that is ultimately held to be a vital aspect of the employee's job.

We have concluded that this chilling effect is a serious concern, and we have therefore decided against a system premised upon a prior request for permission to engage in political activity or critical comment. At the same time, however, we have attempted to minimize the administrative burden that will be required to implement our recommendations. In order to accomplish these objectives, we recommend that, for the purpose of restricting political activity and critical comment, the public service should be divided into two categories: a politically restricted category, comprising those employees who satisfy the criteria set out below, and a category comprising all other Crown employees, the members of which are free to engage in political activity and critical comment, subject to certain standards of conduct and certain restrictions relating to candidature.

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[17] For a description of the system in the United Kingdom, see *supra*, ch. 4, sec. 3(a)(v)c.(1).

[18] Canada, *Report of the Special Committee on the review of Personnel Management and the Merit Principle* (1979) (hereinafter referred to as "D'Avignon Report"), at 171-75.

[19] The chilling effect produced by requiring an employee in the intermediate category to request permission to engage in political activity is ameliorated to the extent that prior *en bloc* permission may be granted. The use of *en bloc* permission in the United Kingdom is referred to *supra*, ch. 4, sec. 3(a)(v)c.(3).

We have tried to define, as clearly as possible, a politically restricted category that includes only those employees whose public political neutrality is essential to the political neutrality of the government service as an institution. In that class, we have undoubtedly included some of the Crown employees who, under the system adopted in the United Kingdom, would fall within the intermediate class, but who would likely be denied permission to engage in most political activities.

We have recommended that all Crown employees who do not fall within the restricted category should be free to engage in all political activities and critical comment without prior determination or prior permission, subject to certain exceptions. In order to preserve the essential elements of political neutrality, it will be necessary to define certain standards of conduct that will apply even to those employees who are not within the restricted category. For the most part, the same standards of conduct will apply to all employees, but some standards will have a very different impact upon employees whose duties are more politically sensitive.[20]

In order to ensure that these employees are apprised of the sensitivity of their positions, we shall recommend that the Crown should be permitted to notify a Crown employee, in accordance with the procedure set out below, that a particular activity is proscribed under one or more of the proposed standards of conduct and that disciplinary action will follow if the employee engages in that activity. This procedure will require the employer to review the functions performed by various employees, having regard to the standards of conduct expected, and undoubtedly will involve some administrative effort. Nevertheless, by creating a "two-tiered" system, consisting of a restricted category, membership in which is determined upon the application of specified criteria, and a category comprising all other employees who are free to engage in political activity and critical comment, subject to certain standards of behaviour, we believe it is possible to avoid, to some extent, both the chilling effect and the administrative burden of the "three-tiered" approach.

The definition of a restricted category for the purpose of engaging in political activity and critical comment is not an easy task, requiring as it does an accommodation between the democratic freedoms of individual employees and the public interest in an impartial public service. In drawing the line so as to accommodate these conflicting interests fairly, it may not be possible to avoid a certain degree of both overinclusiveness and underinclusiveness. We think, however, that it is possible to identify with some accuracy the group of employees who must be precluded from political involvement and critical comment on a significant scale in order to ensure the appearance and reality of institutional neutrality in the government service.

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[20] The political restrictions applicable to all Crown employees are discussed *infra*, this ch., sec. 5. The restrictions that will affect Crown employees differently, depending on the sensitivity of their job functions, relate to potential conflict of interest and apprehension of bias: see *ibid*.

(b) THE RESTRICTED CATEGORY

In defining our restricted category, we have looked at the criteria proposed in the Armitage Report in the United Kingdom[21] and those subsequently adopted for inclusion in the United Kingdom *Civil Service Pay and Conditions of Service Code*.[22] We have also considered the approaches that have been taken by the Canadian jurisdictions that have identified classes of Crown employee who are to be subject to greater restrictions on their right to engage in political activity and critical comment. The extent of the restricted group varies considerably among such jurisdictions. For example, while Alberta and the Yukon Territory impose more stringent restrictions on a defined class of managerial employees, in Manitoba only deputy ministers are members of the restricted group.[23]

The approach that we have taken is not unlike, at least in result, that proposed in the Armitage Report, and we think that if a position-by-position comparison were made, the restricted category that we shall recommend would probably be largely co-extensive with the politically restricted class recommended in the Armitage Report, supplemented by the most restricted individuals in the intermediate class. Because of the importance that we place on the institutional neutrality of the public service in Ontario, we are unwilling to abandon the notion that senior, high-profile, influential Crown employees, who are or may be identified in the public consciousness with the public service as an institution, should reflect in their personal behaviour the neutral character of that institution. There has been at least some suggestion that totally unrestricted political freedom for Crown employees at all levels has led to a diminution in the public perception of institutional neutrality.[24] As a matter of policy, then, the Commission has come to the conclusion that, in the interests of institutional neutrality, at least a small category of senior Crown employees should continue to be restricted in respect of political activity and critical comment. In this connection, it is of interest to note that nearly all the respondents to our call for submissions were prepared to admit that this aspect of the present law in Ontario should be retained.

It must also be said that our proposed restricted category bears a considerable resemblance to the present Schedule 2 under the *Public Service Act*. We have been unable to locate any written rationale for the present population included in Schedule 2, and so our list of members of the restricted category has been developed *a priori*, having regard to the structure of the Ontario public service and the constitutional authority of the Province. Our restricted category, however, includes a substantial number of the members of Schedule 2, and may even include some Crown employees who, either through inadvertence or because of a different perception of the public interest from our own, have not hitherto been included in that Schedule.

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[21] United Kingdom, *Committee on Political Activities of Civil Servants* (Cmnd. 7057, 1978) (hereinafter referred to as "Armitage Report").

[22] Civil Service Order in Council 1969, art. 5, as am. by Code Memorandum CM/662, Sept. 28, 1984. See *supra*, ch. 4, sec. 3(a)(v)c.(2).

[23] See *supra*, ch. 4, sec. 2(a)(ii).

[24] See, for example, Riddell, "Policies on Political Leave in Saskatchewan", unpublished paper presented to the National Conference on Public Sector Management, Victoria, B.C., April 20-23, 1986, in which the Secretary to the Cabinet of Saskatchewan discussed the effect of political activity by senior public servants in that Province.

In fact, it is very difficult to engage in any numerical assessment of the effects of our recommendations. Our research, carried out with the assistance of the staff of the Civil Service Commission, suggests that Schedule 2, in its present form, includes approximately 2,000 Crown employees, leaving aside members of the Ontario Provincial Police, whom we have treated differently below.

Because, as we shall see, our restricted class is not defined entirely by job title, but is also partly defined by reference to the job functions actually performed, it is not possible, in the absence of an analysis by the various ministries and agencies of government of the job functions performed by their employees, to assess with complete accuracy exactly how many people will be caught by our definition of a restricted category. Some aspects of our definition are overlapping, and therefore some Crown employees may be caught by more than one of the criteria for inclusion. Moreover, we have provided for independent adjudication of disputes as to membership in the restricted category, and there is thus inherent in our proposal a certain slippage that will affect any attempt at quantification. The best we can say at this point is that we are of the view that our restricted class will be about the same order of magnitude as Schedule 2, neither dramatically smaller nor dramatically larger.

The rationale that we espouse for our restricted category can be left to speak for itself. If, however, we have altered the boundaries of Schedule 2 by applying that rationale so as to include in the restricted category people who are not now included in Schedule 2, we do so because the logic of our analysis of the public interest requires such an inclusion. Moreover, we think that such inclusion is a reasonable price to pay for the other benefits that accrue because of our recommendations. Our reason for being stringent in defining the restricted category is to ensure the political neutrality of the government service. Once that has been ensured, it becomes possible to relieve the vast majority of Crown employees of the political restrictions now imposed upon them. In our view, the numbers become irrelevant if we can succeed in protecting the political neutrality of the government service while enhancing the personal freedom of the greatest number of Crown employees. Even if our restricted category were to include some 2,000 to 3,000 individuals, a necessary corollary to our recommendation is that in excess of 74,000 employees[25] would be accorded a far greater measure of political freedom than they currently enjoy.

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[25] This figure does not include the many Crown employees who are not represented on the monthly staff strength report. Accordingly, the number of Crown employees who will not be in the restricted category as a result of the implementation of our recommendations could well be substantially higher. Also excluded from this figure are the approximately 4,000 members of the Ontario Provincial Police, dealt with *infra*, this sec.

The employees who, in our view, are appropriately placed in the restricted category fit into five subcategories. The first subcategory comprises line management in the public service, starting at the deputy head of a ministry or chief executive officer of an agency and proceeding down to the level of a branch director in a ministry or the equivalent position carrying similar responsibility in an agency. The second subcategory comprises persons directly involved in the administration of justice. The third subcategory comprises persons directly involved in the formulation of policy in the government or an agency. The fourth subcategory comprises persons employed in a position confidential to certain senior officials within the government or an agency. The fifth subcategory comprises persons employed in a public representative capacity.

The line management group is relatively easy to define, since its membership can be identified on the organization chart of any ministry or agency without much difficulty. The reason for including this group in the restricted category is that its members constitute a group of senior employees directly responsible for policy development, interpretation, and implementation at such a level as to be identified with those policies and their impact on individual members of the public. It is our view that political activity or critical comment by a person at the level of branch director and above would lead to a negative public response, that is, a reasonable perception that senior members of the government service, and thus the government service as an institution, were linked to a political party or its policy positions. We therefore regard the line management group as an appropriate one for restriction.

We cannot pretend that this group has been chosen with any scientific accuracy. Rather, it is defined on the basis of a judgment about the identification of Crown employees with the institution of government that emerges from our study of the way in which government is organized in Ontario. While there may be scope to differ about where the line should be drawn, and whether particular individuals should fall on one side of it or the other, the importance of the line is to distinguish those Crown employees directly responsible for the administration of government policy from those Crown employees who, while perhaps vital to policy implementation, simply perform their duties as assigned, however important those duties may be.

The administration of justice group, while more difficult to define, has the common attribute of direct involvement in the administration of justice in such a way as to affect individuals in their liberty or property. This group should include the following positions:

(1) Provincial Court Judges;

(2) All members of the legal profession employed in a professional capacity and engaged in representing the Crown before the courts, agencies, boards, and commissions, and lay persons performing similar functions before agencies, boards, and commissions;

(3) Registrars of the Provincial Courts, District Courts, and all levels of the Supreme Court, including Local Registrars;

(4) Sheriffs, and Bailiffs of the Provincial Court (Civil Division);

(5) Justices of the Peace;

(6) Masters of the Supreme Court; and

(7) Chairmen, Vice Chairmen, Registrars, and members of all permanent agencies, boards, and commissions exercising adjudicative functions, except members who are expressly appointed to be representative of a particular interest where such members cannot exercise the tribunal's jurisdiction alone.

To some extent, this list replicates a substantial part of Schedule 2; some of the positions covered here are found in Part II of Schedule 2, the general list applicable to each ministry, and others are found in Part III, applicable to the Ministry of the Attorney General. The major deletion is the blanket restriction on Crown law officers, which now applies under Schedule 2. While most members of this group will be caught either because they are directly involved in the administration of justice, or because they have a policy role, as defined below, we have been unable to identify a compelling reason to impose political restrictions on Crown employees merely because they serve as lawyers.

The most significant change to the Schedule 2 list follows from our recommendation that part-time, as well as full-time, chairmen, vice chairmen, and members of agencies, boards, or commissions should be included in the restricted category where those bodies exercise adjudicative functions. There are few positions more readily identified with the institutional interests of the Crown than those that adjudicate between members of the public, or between such members and the Crown itself. No less than judges, the members of such tribunals should display a public image of political neutrality, so that no apprehension of bias on the basis of political allegiances can possibly arise in the course of performing their duties.

We recognize, however, that some tribunals, particularly in the labour relations area, have members who are appointed to ensure that opposing points of view are represented on each panel of the tribunal. For example, the Ontario Labour Relations Board has members appointed to be representative of union and employer interests respectively. The Board usually sits in panels consisting of one member representative of each such interest and a third, "neutral", member. These representative members are appointed to perform a role that is political in a broad sense, and they do not sit alone to exercise any functions of the Board. We think it would be wrong to impose upon them the kinds of restrictions appropriate to all other persons performing adjudicative functions.

The policy group is designed to include all persons who are so identified with the process of formulating policy for a ministry or other arm of the government that their participation in political activity or their critical comment would adversely affect the public view of the neutrality of the public service. This group is not only difficult to define, it is impossible to specify simply by listing classifications to be covered, as has been possible for the previous two groups. We have, therefore, decided to adapt a definition of this group from the *Crown Employees Collective Bargaining Act*, where it is used to define persons to be excluded from the bargaining unit by reason of their involvement in policy development.[26] Our adaptation is simply to make somewhat more rigorous the test to be applied. The definition that we recommend is as follows:

> Crown employees who are directly involved in the formulation of objectives and policy in relation to the development and administration of programmes of the government or an agency of the Crown, or in the formulation of budgets of the government or an agency of the Crown.

It will be obvious that this group will include a substantial proportion of the members of the line management group, and at least some members of the administration of justice group, as well as most government lawyers who are not engaged in representing the Crown before the courts, boards, and tribunals. There are, however, a substantial number of Crown employees in staff positions at various levels in the classification schemes, who are relied upon by ministers and by senior managers for substantial input into the policy-making process. It is this reliance, and the consequent need to be able to trust that the advice being tendered is not politically motivated in any way, that leads us to include these positions in the restricted category.

The fourth group of employees to be included in the restricted category are those so closely identified with certain senior officers of the public service, or with holders of other vice-regal, executive, and judicial offices, as to be subject to a reasonable perception by members of the public of a failure of neutrality should such employees engage in political activity or critical comment. The persons in this category who ought to be restricted from political activity and critical comment are those who are in a relationship "confidential to" those in the identified offices. This is also a relationship borrowed from the labour relations context, and one that has taken on a meaning not merely of receiving information in confidence from the office holder, but of being so intimately involved with the performance of the office as to actually participate in the functions of the office holder.[27]

Under this heading, we think that the restricted group should include persons employed in a position confidential to the Lieutenant Governor, the Executive Council, a minister of the Crown, a judge of a Provincial or District Court or of the Supreme Court, or the deputy head of a ministry or the chief executive officer of any agency of the Crown, and persons employed in a position confidential to any adjudicative board, agency, or commission in relation to its adjudicative functions.

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[26] *Supra*, note 4, s. 1(1)(l)(ii). See *Re Ontario Public Service Employees Union and the Crown in Right of Ontario*, unreported (April 6, 1977, P.S.L.R.T., Shime).

[27] See *Re Crown in Right of Ontario and the Ontario Public Service Employees Union*, unreported (June 8, 1977, P.S.L.R.T., Shime).

The final group of employees in the restricted category are those who are likely to become identified in the public mind with the institution of the government service by reason of their being employed to speak publicly for that institution. This group would obviously include the officials of missions representing the Province in foreign countries, and persons employed in a permanent public relations capacity. This group is difficult to define, and has a tendency to become overinclusive if not carefully circumscribed. A large number of Crown employees are authorized, from time to time, to speak on the government's behalf on one subject or another and to one constituency or another. It is not our intention to include everyone who has such assignments on occasion. Rather, the persons that we would include in the restricted category are those Crown employees whose primary job function is to act in a public representative capacity as official spokespersons in the interests of the Crown or an agency of the Crown.

We should observe that, although they are probably caught by more than one of the subcategories proposed above, we do not intend a minister's political staff to be restricted. Obviously, such staff members will be involved constantly in political activity at one level or another, but they will be doing so as either surrogates or delegates of the minister.

As we have noted, there will be varying degrees of difficulty in identifying the employees actually covered by these five subcategories. In some cases, membership in the group will be obvious; in others, determining membership may require some judgment and, therefore, may be open to reasonable disagreement. We recommend that, where judgment is required, it should be exercised initially by the public service itself, at the instance of deputy heads or chief executive officers.

We are of the view that no one should be considered to be in the restricted category, and therefore subject to the restrictions to be proposed below, until he or she has been notified in writing of membership in that class by the person authorized to make such designations. Moreover, that designation should be subject to appeal to a neutral adjudicative tribunal with authority to summon witnesses, compel testimony on oath, and render a final and binding decision.

Some aspects of our proposed system are not, of course, susceptible of appeal. In the line management group, membership is a question of fact, involving no discretion or judgment. We do not intend that the wisdom of our definition of the restricted category should be appealable, but only whether a particular Crown employee is covered by it.

We therefore recommend that, following initial designation by an appropriate authority, an individual designated should have a right of appeal to one of the public service appeal boards already established for the purpose of dealing with other employment rights and obligations. In virtually every case, given the narrow range of restrictions that we are proposing, that body will be the Public

Service Grievance Board; but should it transpire that any bargaining unit employee is designated as part of the politically restricted class, the appropriate body would be the Crown Employees Grievance Settlement Board. The decision of the appeal tribunal should be final and binding on both the Crown and the individual Crown employee, subject only to the usual judicial review procedures.

Moreover, anyone applying for appointment to a position that is in the restricted category ought to have clear notice of the restrictions that will flow from such an appointment. We therefore recommend that all postings and advertisements of jobs in the restricted category should carry a notice to the effect that the position falls within the restricted category, and that the position will involve certain restrictions on political activity and critical comment.[28]

While we have developed our criteria from first principles, and while the imperatives of a different constitutional system and public service tradition have led to a somewhat different emphasis, a comparison of our criteria for restriction with, for example, the United Kingdom criteria for granting or denying permission to engage in political activity[29] will reveal a substantial degree of similarity. There is, however, one category of employees in the intermediate class in the United Kingdom who, as a result of the application of these criteria, are politically restricted, but in respect of whom we have made no such proposal.

The group of restricted employees to which we refer is composed of those whose official duties involve a significant amount of face-to-face contact with individual members of the public and who make, or may seem to the public to make, decisions affecting them, and whose political activities are likely to be, or to become, known to those members of the public.[30] In our view, this is simply too broad a category for total restriction from political activity and critical comment. Certainly, the most influential members of this group will fall into the administration of justice subcategory, described above, but the range of employees who would presumptively fall under the British criterion is far wider than those members of our administration of justice group who would be covered by that criterion. As will be seen when we discuss the standards of conduct to be required of Crown employees who are not in the restricted category, we have taken pains to identify the damage that might be done by indiscriminate political activity by persons who make decisions affecting the public, and we have attempted to shape prohibitions to prevent such abuses. To go farther than that, however, seems to us to be an excessive response, not justified by the interest to be protected.

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[28] See D'Avignon Report, *supra*, note 18, at 174. The Special Committee was of the view that public servants should be made aware of their rights, whether or not they have been allowed freedom to engage in political activities, and that the burden of interpreting the relevant legislation or guidelines should not fall on them. It therefore recommended that, in the event of a change in the rules governing political activity, "all public servants be advised immediately thereafter of the specific rights accorded them and that advertisements for vacancies and job descriptions make clear the precise degree of political participation permitted the incumbent of a position" (*ibid.*).

[29] The criteria currently in effect in the United Kingdom may be found in *Civil Service Pay and Conditions of Service Code*, *supra*, note 22, para. 9929, reproduced *supra*, ch. 4, sec. 3(a)(v)c.(2). These criteria are based on those recommended in the Armitage Report, *supra*, note 21, reproduced *supra*, ch. 4, sec. 3(a)(iv)c.(2).

[30] This criterion for restriction is reproduced *supra*, ch. 4, sec. 3(a)(v)c.(2).

A comparison of the politically restricted group that we have proposed with Schedule 2 will reveal a substantial number of Crown employees — members of the Ontario Provincial Police — whom we have not included in our group; these persons are specified in Part III of Schedule 2. We received one brief, from the Police Association of Ontario, on the question of restrictions on political activity by police. In our view, however, political activity by police officers raises very different issues than political activity by Crown employees, issues that are beyond the scope of the present study. In our earlier discussion of the present Ontario law,[31] we described how the members of the Ontario Provincial Police came to be covered by Schedule 2. It is only because of the vagaries of statutory interpretation that their status is dealt with under the *Public Service Act* rather than under the *Police Act*,[32] where political activity by municipal police officers is provided for.

We therefore recommend that members of the Ontario Provincial Police now covered by Schedule 2 should be transferred, by statutory amendment, to coverage under the regulations passed under the *Police Act*. It may be that further consideration should be given to the appropriateness of political restrictions on the police, but such consideration is beyond the scope of this Reference.

3. POLITICAL RESTRICTIONS APPLICABLE TO THE RESTRICTED CATEGORY

(a) INTRODUCTION

Having identified the group of Crown employees who, in our opinion, ought to be limited in their political activity for the purpose of preserving the institutional neutrality of the government service, we turn next to consider the nature of the limitations to be placed upon that group. We should observe that the impact of particular restrictions did not appear to be a central concern of the respondents at our public hearings, in the sense that such restrictions were seen as proscribing activities that no member of the government service should ever be restricted from engaging in. Rather, the respondents were, in general, more interested in the application of the existing restrictions to so large a group of Crown employees. We have, therefore, taken into account the lack of any real criticism of the particular restrictions, as opposed to criticism of their application to a broad range of employees, in considering what restrictions would be appropriate to be applied to the restricted group defined above.

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[31] See *supra*, ch. 3, note 228, for a discussion relating to the addition of Ontario Provincial Police officers to Schedule 2 by O. Reg. 38/84.

[32] R.S.O. 1980, c. 381.

(b) MUNICIPAL POLITICAL ACTIVITY

Under section 11 of the *Public Service Act*, a Crown employee, other than a deputy minister and a Schedule 2 employee, is permitted to engage in municipal political activity, so long as

> (a) the candidacy, service or activity does not interfere with the performance of his duties as a Crown employee;
>
> (b) the candidacy, service or activity does not conflict with the interests of the Crown; and
>
> (c) the candidacy, service or activity is not in affiliation with or sponsored by a provincial or federal political party.

Deputy ministers and Schedule 2 employees may not engage in municipal political activity.

Having regard to the nature of municipal office, we are of the view that the present restriction with respect to deputy ministers and Schedule 2 employees is excessively intrusive. There may indeed be members of this group for whom participation in municipal politics would be entirely improper, but we do not think it is possible to say that all members of the group should be absolutely excluded. On the other hand, we think that the statutory limitations now contained in section 11 are all appropriate for members of the restricted category proposed by the Commission. Therefore, participation in municipal political activity that interferes with the performance of an employee's duties, gives rise to a conflict of interest, or involves overt partisan allegiance should continue to be forbidden. In our view, there should also be a procedure by which employees may be informed of the view taken by the Crown of their intended activities. We therefore recommend that members of the restricted category should be permitted to engage in municipal political activity subject to the restrictions now set out in section 11 of the *Public Service Act*, upon obtaining prior permission from an authority designated for that purpose.[33] Where permission is refused, the authority should be required to give reasons for such refusal, and the refusal should be appealable to the appropriate appeal board, whose decision should be final and binding, subject to the usual judicial review procedures.

(c) FEDERAL POLITICAL ACTIVITY

The question whether the Province has legislative authority to restrict its employees in respect of political activity at the federal level is before the Supreme Court of Canada,[34] where argument has been heard and a judgment is expected in due course. We do not presume to predict what that judgment might be; we think, however, that we need not be concerned with the outcome for the purposes of this Reference.

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[33] In British Columbia, the more restricted group, consisting of managerial and certain other employees, may seek nomination as candidates for "public office", provided that they have received written approval of the Public Service Commission: see Treasury Board Order No. 47/79, promulgated as B.C. Reg. 508/79. See, also, discussion *supra*, ch. 4, sec. 2(a)(ii)a. In Alberta, while executive managerial employees may not become candidates in a federal or provincial election, they may become candidates in a municipal election if they receive the approval of the Public Service Commissioner: see Alberta, *A Code of Conduct and Ethics for the Public Service of Alberta* (undated). See discussion *supra*, ch. 4, sec. 2(a)(ii)b.

We have been unable to distinguish any real difference between the major political parties at the federal and provincial levels.[35] So far as we can determine, all these parties have a highly integrated structure on a national basis, although there are separate organizations for provincial political activity and federal political activity. In our view, it is simply not possible, at the level of partisan political activity, to separate the impact of involvement at the federal level by a provincial Crown employee from involvement with the same political party organization, and often the same persons, at the provincial level.

If, therefore, the Province has the legislative authority to deal with political activity at the federal level, we believe that such activity should be subject to precisely the same restrictions as would be imposed in respect of similar activity at the provincial level. To the extent that the public interest in a politically neutral government service is to be protected, we think that the identification of any individual Crown employee with a political party at the federal level will of necessity colour that employee's activity as a Crown employee at the provincial level, and give rise to a perception of political partisanship. We therefore recommend that the proposed restrictions should apply to political activity at both the federal and provincial level.

(d) PROVINCIAL POLITICAL ACTIVITY

We turn finally to the restrictions on political activity that ought, in our view, to apply to the members of the restricted category. As we have said, there has been no argument in favour of increasing the number of restrictions, and there has been fairly general agreement, among the respondents at our public hearings, that the present restrictions are appropriate for a suitably circumscribed group. We have therefore concluded that the restrictions to be applied should be the following:

> Crown employees in the restricted category should be prohibited from engaging in the following political activities:
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> 1. candidature in a provincial or federal election or serving as an elected representative in the legislature of any province or in the Parliament

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[34] See *Re Ontario Public Service Employees Union and Attorney-General for Ontario* (1979), 24 O.R. (2d) 324, 98 D.L.R. (3d) 168 (H.C.J.), aff'd (1980), 31 O.R. (2d) 321, 118 D.L.R. (3d) 661 (C.A.) (subsequent reference is to 31 O.R. (2d)), discussed *supra*, ch. 3, sec. 4(a).

[35] It is of interest that the parties to the *OPSEU* case, *supra*, note 34, agreed in a joint statement of facts in the Ontario Court of Appeal that "the organization and philosophy of the various political parties both federally and provincially are the same": *ibid.*, at 332.

of Canada, unless the employee first resigns from Crown employment;

2. soliciting funds for a federal or provincial political party or candidate;

3. associating his or her position in the service of the Crown with any political activity; and

4. canvassing on behalf of or otherwise actively working in support of a provincial or federal political party or candidate during an election or at any other time.

As will be seen below, we have also come to the conclusion that members of the restricted category should be subject to somewhat more stringent restrictions on their freedom of expression than members of the government service as a whole. This matter is dealt with later in this chapter in our recommendations on critical comment by Crown employees.[36]

4. CANDIDACY IN A FEDERAL OR PROVINCIAL ELECTION BY CROWN EMPLOYEES NOT IN THE RESTRICTED CATEGORY

At present, Crown employees, other than deputy ministers and Schedule 2 employees, who wish to accept a nomination for a federal or provincial political office and run for that office must take a leave of absence.[37] We recommend that this restriction should be retained for those Crown employees not in the proposed restricted category.[38] We are satisfied that the leave of absence should be without pay.[39] However, we do not see any reason for the loss of seniority and service credits that now attends a leave of absence; we are of the view that the employee's public service should be considered as continuing, albeit in a different sphere, during leave.

We agree, in general, with the current legal position in which the leave of absence may commence as soon as the writs are issued for an election, and must commence upon nomination after the writs have been issued.[40] However, in order to permit someone who has been nominated as a candidate to meet the responsibilities of that candidacy, we recommend that a candidate, once nominated, should have the option of commencing the leave of absence even if the writs for an election have not yet been issued. A candidate nominated prior to the issuance of the writs must, however, commence the leave as soon as the writs are issued.

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[36] See *infra*, this ch., sec. 6.

[37] *Public Service Act*, *supra*, note 7, s. 12(1)(a).

[38] It will be recalled that, under the proposals made in the preceding section, employees in the restricted category would have to resign in order to become a candidate or serve as an elected representative.

[39] We doubt that many private sector employers grant paid leave for such a purpose, and we received no plausible submissions that the government should grant paid leave.

[40] Pursuant to s. 9 of the *Election Act, 1984*, S.O. 1984, c. 54, when an election is to be held, the Lieutenant Governor in Council may "appoint and proclaim" a day "for the close of nominations and the grant of a poll where required", popularly known as nomination day, and a day for the "taking of a poll", that is, election day. If more than one candidate is nominated, the returning officer must grant a poll for taking the votes: *ibid.*, s. 29(1). The day for the close of nominations and the grant of a poll cannot be more than 60, and not less than 23, days "after the date of the writs of the election":

We wish to observe that many of the political restrictions applicable to all Crown employees, which we recommend in the section that follows, will have a particular impact on a person who has already been nominated as a candidate but who has not yet commenced a leave, and will thus require such a person to be especially careful that he or she does not offend against any of the proposed rules. While we have considered the possibility of requiring a mandatory leave of absence immediately upon nomination in every case, we think that this would produce undue hardship in some circumstances where a nomination takes place in anticipation of an early election, and the election is not held. We are, therefore, prepared to leave such matters to the judgment of the individual candidate, subject to the expression of concern that we have set out.

In every case, the leave of absence should extend, at the employee's option, for a short period after election day, and it would be appropriate to allow an extension for a defeated candidate sufficient to permit a recount or other appeal procedures to be carried out if necessary. Where an employee is not elected, the employee should be entitled to return to work and, as we have said, should be treated for all purposes as if he or she had been employed in the public service for the full period of the leave of absence, except for the loss of pay during that period.

We think that the present statutory provisions for resignation and reinstatement in employment[41] of an employee elected to a federal or provincial office remain appropriate and, accordingly, should be retained. Once again, however, we recommend that an employee returning to a position in the service of the Crown should be entitled to count the period of time served in an elective office towards seniority and service credits in the public service. Our reasons are the same as those given above, that is, the employee is essentially continuing in public service, but in a different capacity, during the period of elective office.

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ibid., s. 9(a). The day for the taking of a poll, that is, election day, is generally the fourteenth day after the grant: *ibid.*, s. 9(b).

Thus, under the *Election Act, 1984*, the day appointed for the close of nominations and the grant of a poll is a fixed day that is independent of the day on which an individual is actually nominated as the candidate of his party.

Section 12(2) of the *Public Service Act*, *supra*, note 7, refers to "the day provided by statute for the nomination of candidates". The *Election Act*, R.S.O. 1980, c. 133, repealed by the *Election Act, 1984*, had provided that the Lieutenant Governor in Council may appoint a day for the nomination of candidates. The language of s. 12(2) has not been amended to reflect the fact that, under the new legislation, there no longer is a "day provided by statute for the nomination of candidates", but only a day appointed for the close of nominations.

[41] *Public Service Act*, *supra*, note 7, s. 12(3) and (4).

5. POLITICAL RESTRICTIONS APPLICABLE TO ALL CROWN EMPLOYEES

As we have observed earlier, our objective in identifying a restricted category is to protect the institutional neutrality of the government service. Once that group is defined, all employees who are not members of that group should be free to engage in political activity to the same extent that they might engage in the activities of any religious, social, or charitable organization. Those in the politically restricted group would be permitted to engage in political activity only to the extent that they have not been expressly restricted, as proposed above. There will, of necessity, have to be certain restrictions imposed on both groups, even those in the free group, in order to protect vital interests of the government service, but those restrictions ought to be strictly limited to what is necessary to protect identifiable public interests. We have, therefore, sought to define the kinds of conduct that will have deleterious effects on the efficient and evenhanded functioning of the government service, and to aim our restrictions at the suppression of such conduct.

(a) GENERAL RULES OF CONDUCT

As indicated above, the Commission has concluded that all employees should be subject to a set of restrictions governing conduct in relation to political activity. To some extent, these are restrictions that could be applicable not only to political activity, but to almost any kind of non-employment activity of public servants. We have also concluded that certain of these restrictions should apply only to certain employees at certain times; but these restrictions will not be of significant concern to the vast majority of employees.

We have considered the possibility that the restrictions that we are about to recommend could simply be left to the common law relating to employment, as elaborated by the various tribunals responsible for administering that law. However, we have come to the conclusion that it would be better to specify precisely the various aspects of a code of conduct in respect of political activity to which employees are expected to adhere, and for breaches of which disciplinary action, up to and including discharge, might be taken.

Given the condition in section 1 of the *Canadian Charter of Rights and Freedoms*[42] that restrictions on fundamental freedoms must be "prescribed by law", it could be argued that such restrictions must be specified with precision. We believe that the various elements of our code of conduct in respect of political activity will satisfy this condition. Whatever may be the constitutional requirement, however, we recommend that the code that we propose below should be enacted by statute, much as is the present set of restrictions on political activity. Statutory enactment takes place through the public legislative process, thus encouraging general public awareness of what is being proposed and of the arguments for and against the proposals. When the provisions are finally enshrined in a statute, the advertising value of such treatment will make it clear to Crown employees the central importance attached to the code of conduct in respect of political activity and critical comment.[43]

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[42] *Supra*, note 1.

With respect to the contents of the proposed code, we observe first that, as a fundamental aspect of the employment relationship, employees are expected to perform their assigned duties competently and efficiently. Nothing in the restrictions that follow is intended to derogate from that duty. We have considered recommending the enactment of a code of affirmative political rights in respect of which no disciplinary action could be taken,[44] but have rejected this approach precisely in order to avoid the situation where an employee asserts the right to engage in a particular type of political activity as a justification for poor work performance. During working hours, employees must be present at work and able to carry out their jobs efficiently, and off-duty involvements, however important, must not interfere with that obligation.

On the other hand, there is one political right that we think Crown employees ought to be able to assert under any circumstances, and that is the right to abstain from any political activity whatsoever. If Crown employees are to be free to engage in political activities, they must also be free to refuse to engage in such activities. As we have seen, some arguments in favour of political restrictions claim that those restrictions protect Crown employees from being improperly conscripted as political workers by the political party in power.[45] We have already expressed our view that prohibiting the exercise of a fundamental freedom in order to protect one's right not to be required to exercise that freedom in a particular way seems scarcely responsive as a solution to the problem.[46] We think that the same result can be better achieved by asserting a positive protection against political coercion of Crown employees, and we have, in effect, adapted the language of the Saskatchewan *Public Service Act*[47] for that purpose. We, therefore, recommend that the following general protection should be applicable to all Crown employees:

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[43] Critical comment is discussed *infra*, this ch., sec. 6.

[44] See Ontario Public Service Employees Union, *Submissions by the Ontario Public Service Employees Union to the Ontario Law Reform Commission relating to Public Employees Freedom of Expression* (February 18, 1986, Revised February 25, 1986), Part III, "Draft Legislation" (hereinafter referred to as "OPSEU draft legislation"). The OPSEU Submissions, including the draft legislation, are on file at the Commission offices.

[45] See, for example, Gallant, "Service Above Party" (1986), 7 Policy Options Politiques, No. 2, 8.

[46] See *supra*, ch. 5.

[47] R.S.S. 1978, c. P-42, s. 50(1)(a). A provision identical to s. 50(1)(a) of the Saskatchewan Act appears in the Prince Edward Island *Civil Service Act*, S.P.E.I. 1983, c. 4, s. 39(1)(a), and in para. 4 of Newfoundland Order-in-Council 951-'75 (August 18, 1975), which regulates political activity by public servants. However, these are generally restrictive jurisdictions; in Prince Edward Island, "partisan work in connection with any election" is proscribed, and, in Newfoundland, employees cannot "at any time, engage in any partisan activity for or on behalf of any political party or candidate".

See, also, s. 44(8) of the Manitoba *Civil Service Act*, R.S.M. 1970, c. C110, as en.

> No Crown employee shall be in any manner compelled to take part in any political undertaking, or to make any contribution to any political party, or be in any manner threatened or discriminated against for refusing to take part in any political undertaking or to make any contribution.

In our view, a protection of this sort is also an essential element of the doctrine of political neutrality; without it, there is very little to prevent political freedom from becoming political enslavement.

The general restrictions that we shall recommend should be imposed on all Crown employees are essentially matters of common sense. The first two are adapted from the current law, and are intended simply to ensure that political activity is off-duty conduct, and does not become a part of the workplace atmosphere. To this extent, we recognize the validity of the argument that the public perception of the political neutrality of Crown employees ought not unnecessarily to be interfered with. We, therefore, recommend that the following restrictions should be applicable to all employees at all times, with the exception of employees who are on a leave of absence in connection with a political candidacy:

> A Crown employee shall not undertake any political activity during his or her working hours.
>
> A Crown employee shall not undertake any political activity at his or her place of employment.

Obviously, even a Crown employee who is a candidate on a leave of absence will not have complete freedom to engage in political activity at his or her place of employment, if that place of employment is not one to which candidates normally have access. The reason we propose to lift this restriction for employees on a candidacy leave is that they should be in no worse position in respect of canvassing at the place of employment than other candidates. Thus, for example, if a Crown employee's place of employment is a place to which other candidates for election in that constituency may have access, the Crown employee on candidacy leave would be relieved of this prohibition for the period of the leave.

The second set of restrictions is aimed at conduct that is improper in itself, and that would indeed be improper in relation to any off-duty activity. Because of the nature of the prohibitions to be recommended, we propose that they should apply to Crown employees on candidacy leave as well as those in active employment. In our view, the following restrictions should apply to all Crown employees, including those on leave:

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by S.M. 1974, c. 46, s. 11, which uses a different provision for the same purpose. Under the Quebec *Public Service Act*, S.Q. 1983, c. 55, s. 130, "every person who uses intimidation or threats to induce a public servant to engage in partisan work or to punish him for refusing to do so is guilty of an offence and liable, in addition to costs, to a fine of $500 to $5,000".

> A Crown employee shall not undertake any political activity that in any way amounts to coercion or gives rise to a reasonable apprehension of coercion by reason of the employee's position in the service of the Crown.
>
> A Crown employee shall not undertake any political activity that would take improper advantage of the employee's position in the service of the Crown.

The first of these restrictions is, in part, the mirror image of the protection against forced political activity set out earlier. It prohibits Crown employees who are in a position to coerce other Crown employees from doing so. There is another aspect, however, to this prohibition. Some Crown employees are in a position to be able to put pressure on members of the public. We are particularly concerned that there should be a firm prohibition on any conduct that could give rise to a reasonable apprehension that the power that Crown employees occasionally exercise over members of the public is being misused.

The second of these prohibitions is designed to protect what we think is intended by the vague, and so far uninterpreted, provisions of section 12(1)(c) of the *Public Service Act*, which states that a Crown employee shall not "associate his position in the service of the Crown with any political activity". There seems to be no reason to prohibit a Crown employee who seeks, for example, an executive position in a party constituency association from simply relying upon his or her occupation and experience as part of the justification for being elected. It is only if the association of Crown employment with the political activity goes further to include some element of impropriety that the association becomes culpable. It is therefore to permit the right of Crown employees engaged in political activities to identify themselves by relation to their occupation that we have chosen this wording.

In addition to the general restrictions recommended above, there are two further restrictions that might apply to a small proportion of employees not in respect of all political activity, but only in respect of certain kinds of political activity. We are particularly concerned with the possibility of a direct conflict of interest between political activity and the interest of the Crown. The current law, in section 11 of the *Public Service Act*, already provides for such a restriction on political activities at the municipal level, and we think it is appropriate to extend this kind of restriction to all political activity at the municipal, provincial, and federal level. In our view, there is really nothing different about a conflict of interest that arises from political activity and a conflict that arises from any other kind of activity; in every case, the hallmark of a conflict of interest is whether the activity raises a reasonable concern about whether the employee, in carrying out his or her duties as a public servant, will be serving the Crown's interest or the other interest that is in conflict. We wish to emphasize, however, that a mere difference of political views from the government of the day does not constitute such a conflict.

The Commission has concluded and, accordingly, recommends, that the following further restriction should be applicable to all Crown employees:[48]

> A Crown employee shall not engage in any political activity that produces a direct conflict with the interests of the Crown in connection with the performance of his or her duties as an employee.

In our view, Crown employees should be put on notice that, for some of them in some circumstances, a conflict of interest can arise as readily from political activity as it could from any other outside activity. They must, therefore, be on their guard to identify such conflicts, and to deal with them in much the same way as they would with any other conflict of interest.

We appreciate that this restriction has an element of uncertainty about it. So, of course, does any prohibition on conflict of interest, since in many cases it is only the individual directly involved who can assess whether a conflict is about to arise. For the vast majority of Crown employees, however, this prohibition will create no real difficulty. For those whose responsibilities are such that they may be influenced in the performance of their work by commitments to outside activities, what this prohibition requires is really nothing more than is expected of them in respect of outside activities that are not political in nature. In our view, the prohibition is necessary to protect the public interest, and is a reasonable price to pay for the substantial liberalization of political rights for the vast majority of public servants.

The second major concern that we think must be addressed is the possibility that a public servant involved in adjudicative, allocative, or evaluative decision-making may be perceived to be biased in the exercise of those functions by reason of his or her political activity. Many public servants make decisions about whether a member of the public has an entitlement, or should be granted a discretionary benefit, under a government programme. Similarly, public servants may be required to judge the performance of members of the public or subordinates. These decisions must be protected from any hint of bias.

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[48] In dealing with a conflict of interest arising from political activity, the federal Task Force on Conflict of Interest stated:

> Any activity of a political nature which brings into question the professionalism of a public office holder would imply a conflict of interest situation. The conflict here is not of a financial or material nature, but rather in the nature of a breach of trust, calling into question the doctrine of a politically neutral and impartial public service. Such questioning may have the end result of rendering the person unable to carry out the job of a public office holder because of a public perception of bias.

Canada, *Report of the Task Force on Conflict of Interest: Ethical Conduct in the Public Sector* (1984) (hereinafter referred to as "Task Force"), at 43.

This statement, at face value, appears to be much broader than the Task Force might have intended. It is based upon the approach taken by the Task Force to its mandate to deal with "public office holders", which it interpreted to include members of the public service who fit that description. The choice of that expression implies a considerable degree of responsibility, involvement in policy matters, and influential status; it does not appear that the Task Force intended it to apply to every member of the public service of Canada, including those in jobs where they could more accurately be described as employees than as office holders.

A perception of bias may arise for some employees only in limited circumstances: for only some kinds of activities, or only in some geographical areas, or only in relation to some persons in respect of whom those activities are carried out. We think that the appropriate test of whether a particular activity gives rise to this concern is whether there is a reasonable apprehension, on the part of the public, of bias in the performance of duties of an adjudicative, allocative, or evaluative nature.

The interest that we seek to protect here is very similar to that protected by the criterion established in the United Kingdom to restrict the political activity of members of the intermediate class who are involved in face-to-face contact with individual members of the public and who make, or appear to make, decisions affecting those members.[49] While we find the language of the United Kingdom restriction too sweeping for our purposes, it is also clear that an important element of institutional neutrality in the government service is the right of the public at large to be assured of fair and unbiased treatment in all dealings with that service. Where a Crown employee serves on a tribunal performing adjudicative functions, we have already seen fit to place that Crown employee in the restricted category proposed earlier. Where the adjudication, or the allocative or evaluative decision, is made at a more direct level, such as a decision of a welfare administrator concerning the entitlement of a particular individual to welfare benefits, we think it is necessary to place Crown employees on notice that, if they exercise such functions, they must take particular care to ensure that their political activities do not jeopardize their personal integrity and their ability to carry out those functions fairly, as well as the public's perception of their integrity and ability to perform.

For example, a welfare administrator who demanded political contributions from a client in return for a favourable decision on entitlement to a benefit would clearly fall afoul of our rule against coercive activity. The same welfare administrator who simply collected door-to-door for political contributions in the neighbourhood where his or her clients lived would not be guilty of coercion, but would certainly raise considerable doubt among clients and the public concerning whether subsequent decisions relating to entitlement would be influenced by whether or not a campaign contribution was forthcoming.

Once again, we recognize that there are some uncertainties in the application of a restriction of this kind. Nevertheless, we consider this prohibition, like the conflict of interest prohibition, to be essential if the integrity of the government service is to be maintained. It seems an appropriate price to pay for the political freedoms of the great majority of Crown employees to require those performing particularly sensitive tasks to take careful stock of the impact that their outside activities may have, or may be perceived to have, on their ability to perform their jobs.

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[49] See *supra*, ch. 4, sec. 3(a)(v)c.(2). See, also, Armitage Report, *supra*, note 21, para. 147, at 43-44. The recommendation in the Armitage Report was much more precise than the provision ultimately included in the 1984 revisions of the *Civil Service Pay and Conditions of Service Code*, *supra*, note 22. The Armitage recommendations were much closer to ours, and avoided the overreach that we have found too sweeping in the criterion finally adopted in the United Kingdom.

The effect of these considerations will not be to move a Crown employee from the free class into the restricted class. Rather, we think it is appropriate that a Crown employee should be restricted from the kinds of activities, or from those activities in certain circumstances, that are necessary to prevent a reasonable apprehension of bias.

It is obviously impossible to identify in advance all the persons who might be affected by this kind of restriction. We think it is appropriate, therefore, to recommend that a criterion should be defined, and that a process be proposed for the resolution of disputed interpretations. The prohibition that we propose is as follows:

> A Crown employee shall not engage in any political activity that gives rise to a reasonable apprehension, on the part of the public, of bias in the making by that employee of any adjudicative, allocative, or evaluative decision in the course of his or her duties as an employee.

(b) PROCEDURAL CONSIDERATIONS

Some of the general restrictions that we have proposed above will be very easy to interpret; others will require a substantial degree of judgment to be brought to bear. Sometimes the mere commission of one act will constitute the offence, while in other cases the progress from permitted to prohibited activity will be incremental. We have already set out, as a general structural recommendation, that the enforcement of these prohibitions, and their interpretation and application in particular circumstances, should be subject to adjudication before one of the public service appeal boards, and that the jurisdiction of these boards should be expanded to permit adjudication of these matters.[50]

We think that there also ought to be a mechanism by which the Crown can put employees on notice that a particular kind of conduct does, or will, offend against these general restrictions. This will obviously require government ministries and agencies to consider the application of these restrictions to various kinds of employment. But, once again, we think that this exercise will be limited to Crown employees in particularly sensitive positions, and will simply require the articulation of what constitutes proper and ethical conduct in a given public occupation.

The procedure that we recommend is that a Crown employee may be notified in writing that a particular activity is proscribed under one or more of the general restrictions proposed above, and that disciplinary action will follow if the employee engages in that activity. This recommendation would permit the Crown to identify, in advance, classes of employees for whom certain kinds of activities, or activities in relation to certain groups, or activities in certain geographical areas, would run afoul of the restrictions. It would also permit the Crown to identify particular individuals who should refrain from a specific activity. Finally, it would permit the Crown to put an employee on notice, once a particular activity has come to the Crown's attention, that continuation of that activity would be subject to disciplinary action. In all these cases, the Crown's notice should be subject to the grievance and appeal procedures available to the employee or class of employees affected. Similarly, any discipline taken should be subject to the same procedure, and the fact that an activity is undertaken contrary to express notice should be relevant to the question of the appropriate penalty.

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[50] See *supra*, this ch., sec. 1.

We have considered, and ultimately rejected, the possibility of permitting an employee to be subject to disciplinary action, whether, for example, suspension, demotion, or discharge, only after he or she has been warned that a particular type of political conduct will indeed attract such action. Given the necessarily general wording of some of our restrictions, particularly those relating to conflict of interest and apprehended bias, the requirement of a prior warning would have the effect of giving some certainty to what is expected of a Crown employee. On the other hand, we believe that there will be some breaches of these provisions, even the generally worded ones, that will be obviously culpable and clearly deserving of serious discipline. A regime in which the first penalty must always be a warning will simply permit a Crown employee to engage in a prohibited political activity on one occasion without suffering any adverse consequences. The interests being protected are too important to allow this to take place.

Given the broad jurisdiction in relation to disciplinary penalties that we have recommended for the public service appeal boards, we think that those tribunals will be able to shape a penalty to fit all the circumstances. Where the prohibition is written in general language, and the commission of the offence is open to reasonable disagreement, no doubt a warning will often be held to suffice. Where there has been a warning, either because of previous conduct of the same kind or through the more formal notice procedure that we have recommended, the tribunal will undoubtedly take this fact into account in assessing a heavier penalty.

The ways in which the restrictions set out above can be breached by a public servant will vary from the venial to the very serious. Because of the necessity to make the penalty fit the offence, and to take into account all the circumstances of each case, we do not think it is appropriate to retain section 16 of the *Public Service Act*, which effectively deems all breaches of the restrictions on political activity to be just cause for dismissal. Some such breaches may well deserve that penalty; others may quite reasonably be dealt with by much less stringent discipline, even as light as a reprimand. We believe that the appeal boards should have jurisdiction to impose a penalty commensurate with the gravity of offence. Accordingly, we recommend that section 16 of the *Public Service Act* should be repealed. Because there is some doubt concerning the power of the Public Service Grievance Board to substitute a lesser penalty, the immediately preceding recommendation may require an amendment to the constituent regulation to remove any such doubt.[51]

It may be that some issues relating to the propriety of certain conduct will arise on very short notice, as, for example, when an employee proposes to engage in certain activity and the employer warns that engaging in that activity will attract disciplinary action. If the activity relates to an imminent election, for example, the employee may lose forever the opportunity to exercise the political right in question, since the appeal process may take too long to vindicate that right. We have considered a number of ways of responding to this problem, and have ultimately concluded that the tribunals themselves are the best source of relief in such cases. Where a matter is made to appear urgent, and where the right that will be lost will be lost forever, it will no doubt be possible for a tribunal to schedule an early hearing to bring the matter on for a final and authoritative resolution.

There may also be circumstances in which a Crown employee will simply want advice from a knowledgeable and independent source, in confidence, concerning whether or not a certain course of action will be likely to offend the law. Accordingly, we recommend that Crown employees should be able to seek the advice of the Special Counsel, the establishment of whose office we have already recommended as one of our structural proposals,[52] and whose role will be considerably augmented by the proposed responsibilities, set out below, relating to "whistleblowing".[53] The Special Counsel will gain considerable experience in the law relating to public service employment, and will likely be of great assistance to Crown employees who might otherwise be in some doubt concerning their rights and obligations.

Earlier, the Commission recommended that solicitor-client privilege should apply to all communication between the Special Counsel and Crown employees.[54] Of course, that privilege will be the employee's to shelter behind or to waive, and it may be that an employee will wish, in respect of subsequent disciplinary action, to invoke the Special Counsel's advice as evidence that he or she acted in good faith, even if the Special Counsel's advice is ultimately found to be wrong. Accordingly, we recommend that, at the employee's option, the Special Counsel's advice should be admissible as a fact before the tribunal, to be considered by the tribunal to whatever extent it is found to be relevant to the proceeding before it.

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[51] See *supra*, ch. 1, sec. 3. It will be recalled that, under our structural recommendations proposed in section 1 of this chapter, we recommended that the jurisdiction of the Public Service Grievance Board should be expanded to cover interpretation and discipline, as well as dismissal.

[52] See *supra*, this ch., sec. 1.

[53] See *infra*, this ch., sec. 7(e)(iv).

[54] See *supra*, this ch., sec. 1.

6. CRITICAL COMMENT BY CROWN EMPLOYEES

(a) INTRODUCTION

As we have observed, whatever effect the *Canadian Charter of Rights and Freedoms* may have on restrictions on political activities by public servants, a challenge to the current section 14 of the *Public Service Act* under section 2(b) of the Charter seems particularly likely to succeed. While it appears that the language of section 14 has been read down by those responsible for its administration,[55] even what is left of the section constitutes an obvious infringement of the freedom of expression protected by section 2(b). Once again, we do not suggest that it might not be possible to make an argument justifying the restrictions within the meaning of section 1 of the Charter; as we have stated, however, we think that such a justification is less likely to succeed than a justification for any of the other current restrictions on political activity set out in the *Public Service Act*.

Moreover, the *dicta* of Chief Justice Dickson in the *Fraser*[56] case, although they do not relate directly to the effect of the *Canadian Charter of Rights and Freedoms*, make it clear that the courts are unlikely to uphold so sweeping a restriction on freedom of expression.

The difficulty in abstracting much real guidance from the cases on the permissible limits of public comment by Crown employees is that they seem most often to deal with extreme situations, where an employee has clearly gone too far and the discipline imposed is clearly appropriate. In the process of getting to that stage, arbitrators, adjudicators, and the courts find that they are required to explain the importance of freedom of expression, and the unacceptability of a complete ban on that freedom. Having done so, the judgments then turn to a description of why the particular employee's conduct went too far. It is unusual for the precise boundaries of proper critical comment to be sketched out for the guidance of other employees who must attempt to shape their own conduct to the requirements of the law. Indeed, even in the *Fraser* decision, where several forms of permissible comment are described, and the appellant's own conduct is given as an example of what is not permissible, there remains a vast middle ground in which Crown employees who may wish to speak publicly on matters of public importance can find very little guidance.

We have considered the possibility, nevertheless, of simply leaving the elaboration of what is or is not permissible critical comment of government activity to a case-by-case exegesis in the adjudicative process. We have, however, rejected this approach simply because it gives far too little guidance to employees who wish to weigh their own participation in public debate against the required standards of conduct for a Crown employee. Once again, therefore, we have decided to attempt to deal with this problem from first principles, and to strike a reasoned balance between, on the one hand, the freedom of expression of individual employees, and, on the other, the public interest in the effective operation of the public service.

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[55] See the discussion of the official interpretation of this section, *supra*, ch. 3, sec. 3(a)(ii)f.

[56] *Re Fraser and Public Service Staff Relations Board* (1985), 23 D.L.R. (4th) 122 (S.C.C.), at 133-34, aff'ing [1983] 1 F.C. 372, (1982), 142 D.L.R. (3d) 708 (C.A.), aff'ing (1983), 5 L.A.C. (3d) 193 (P.S.S.R.B., Kates) (subsequent references are to 23 D.L.R. (4th)). The *Fraser* case is discussed *supra*, ch. 3, sec. 2(b)(ii).

It will be obvious that, in the public sector as in the private sector, there is not, and cannot be, an unlimited right for employees to criticize their employer. The *Fraser* decision is replete with warnings that the institutional neutrality of the government service, as well as the impartiality, loyalty, fairness, and integrity of individual employees, must act as a restraint upon the right of the employee to criticize the government. Indeed, in the private sector, an employee's right to criticize his or her own employer is very severely limited, and if that criticism has the effect of producing any harm to the employer in its business, the employee is liable to discharge.[57]

What makes government employment different from private employment is that the government is not only an employer, but is also the government of a democracy, and the government employee is not only an employee, but is also a member of the public to whom that government is as responsible as to any other member. In the words of the Chief Justice of Canada in the *Fraser* case:[58]

> [O]ur democratic system is deeply rooted in, and thrives on, free and robust public discussion of public issues. As a general rule, all members of society should be permitted, indeed encouraged, to participate in that discussion.

To place serious limitations on the right of Crown employees to take public positions on political questions will severely limit their right to participate as members of society in the political process. To leave them totally free to engage in such comment will of necessity, in some cases, adversely affect their efficiency, and the public perception of their impartiality, as employees. The balance to be sought, therefore, should maximize the rights of the employee, as a member of society, to engage in the kind of criticism of government policy and action that all members share, without impairing the employee's effectiveness as a Crown employee. We have therefore attempted to identify ways in which critical comment may impair the effectiveness of an employee to carry out his or her own duties in the service of the Crown and the public perception of his or her impartiality.

In this part of our recommendations, we have spoken of "critical comment". For our purposes, this expression has both a positive and a negative aspect. It is not only complaints about the government that might impair an employee's effectiveness, and the public's view of his or her impartiality, but also comments supportive of government policies. We therefore speak of critical comment in the literal sense of the words, importing either approbation or reprobation. Moreover, we are concerned with comment that is public; we do not intend to catch either purely private or anonymous expressions of opinion. It is only where there is a direct and public connection made between the employee's expressions of his or her opinion and the speaker's employment in the service of the Crown that the proposed restrictions should become operative.

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[57] The duty of loyalty applicable in the public sector is discussed *supra*, ch. 3, sec. 2(b)(ii).

[58] *Supra*, note 56, at 131.

(b) RESTRICTIONS ON CRITICAL COMMENT BY EMPLOYEES IN THE RESTRICTED CATEGORY

Earlier in this chapter, we recommended that the most stringent restrictions under the *Public Service Act* should be continued for a category of employees who may be said to represent the institutional neutrality of the government service.[59] Public comment and partisan political activity are very closely intertwined,[60] and speech is perhaps the most effective and traditional form of political activity. It would therefore be anomalous to prohibit other kinds of political activity, without preserving some element of the prohibition on public partisan utterances caught by the official interpretation of section 14.

Once again, since section 14 of the *Public Service Act* only applies to civil servants, and our proposed restriction on critical comment applies to all Crown employees in the restricted category, whether or not they are civil servants, some people may be caught by a restriction on freedom of expression who were not caught before. Our answer is the same: the restriction is as narrowly drawn as possible, consistent with the protection of the political neutrality of the government service, and while it may apply to a few more individuals, it permits a much larger group to enjoy greater freedom of expression than permitted under section 14.

The essence of comment that we think should be prohibited is comment that identifies the Crown employee with, or against, the interests and policies of a particular political party. We therefore recommend that the following restriction should apply to Crown employees in the restricted category:

> A Crown employee in the restricted category shall not engage in critical comment on government policy or government action that identifies the Crown employee or the comment with a political party.

(c) RESTRICTIONS ON CRITICAL COMMENT APPLICABLE TO ALL CROWN EMPLOYEES

For all Crown employees, it is necessary to identify the interests of the government service that are sufficiently important to be protected even at the expense of some loss of the employee's freedom of expression. We have been able to identify four aspects of the public interest sufficiently important to be protected in such a way as to warrant some infringement on the freedom of expression of Crown employees. These interests are not unrelated to interests that we have thought important enough to protect against political activity since, as we have already noted, the exercise of critical comment blends into, and is often the same as, political activity of a less articulate kind.

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[59] See *supra*, this ch., secs. 2 and 3.

[60] See Task Force, *supra*, note 48, at 46 and 238-39.

The first interest that we would protect is the loyalty of the employee, in the performance of his or her duties, to the interests of the Crown. Some critical comment raises the possibility that a conflict of interest, as we have already defined such a conflict in our recommendations on political activity, might result from the views held and expressed by the Crown employee.

This possibility was recognized in the Report of the federal Task Force on Conflict of Interest,[61] and although that Report took a somewhat different approach from the one we are recommending, we think that the degree of caution that is to be imposed upon Crown employees by restrictions on critical comment ought to include a caution that such comment may occasionally result in a reasonable doubt about whether the employee, in carrying out public functions, is serving the interest of the Crown or some other interest. Obviously, such a restriction will weigh much more heavily upon senior members of the government service than upon the junior grades, and members of the restricted category will be required to exercise the greatest circumspection of all. It is not sufficient, however, to apply this restriction only to the restricted category, since there are undoubtedly a number of Crown employees not in that category who could cause serious damage to the public interest by unguarded comment.

We therefore recommend that the following restriction on critical comment should be applicable to all Crown employees:

> A Crown employee shall not engage in critical comment on government policy or government action where such comment creates a direct conflict with the interests of the Crown in connection with the performance of the employee's duties.

The second interest to be protected is the impartiality of Crown employees engaged in adjudicative, allocative, or evaluative decision-making on behalf of the Crown. Where a Crown employee's comments give rise to a reasonable apprehension of bias in the performance of such duties, we think that the Crown has a reasonable interest in suppressing such comments. A welfare administrator, for example, who publicly criticizes a certain aspect of welfare benefits as being overly generous, or who characterizes the class of applicants covered by a benefit in an unflattering or insulting way, may thus be perceived by the public as biased in interpreting the welfare regulations on a case-by-case basis to determine whether an individual applicant is entitled to benefits.

As we shall discuss in more detail below, it is important that those who perform a formal adjudicative function where the interests of the government conflict with the interest of the individual should not in any way be hampered from criticizing the government where such criticism is part of the performance of the employee's official task. It should be emphasized that, in the imposition of restrictions on critical comment, we are speaking about the conduct of Crown employees in their personal capacity; where their official capacity involves criticism of government policies, that comment should be beyond the reach of these restrictions.

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[61] *Ibid.*, at 238-39.

We therefore recommend that the following restriction should apply to all Crown employees:

> A Crown employee whose duties include adjudicative, allocative, or evaluative decision-making shall not engage in critical comment on government policy or government action where such comment creates a reasonable apprehension of bias in the performance of the employee's duties in relation to such decision-making.

A third interest to be protected is the smooth and effective operation of the public service. Where an employee engages in critical comment so as to isolate himself or herself from fellow workers or supervisors, leading to a breakdown of normal relationships, it may become intolerable for the employee to continue to work in the environment thus poisoned by the nature of things said publicly, or by the way those things were said.

Indeed, many of the adjudication cases, including *Fraser*,[62] identify "vitriolic and vituperative" comment as comment that simply goes too far. Comment of this kind is clearly likely to impair the effectiveness of the Crown employee, and therefore to reduce significantly the employee's real, and perceived, worth to the government service. Such comment also transgresses against the basic obligation of loyalty owed by employees to employers. Finally, this type of comment tends to degrade rather than to enhance the employee's contribution to the free and robust public discussion of public issues.

We therefore recommend that the following restriction should be applicable to all Crown employees:

> A Crown employee shall not engage in critical comment on government policy or government action, or express such critical comment in such a way, so as to create a reasonable apprehension that working relationships within the public service involving the employee, or the employee's ability to perform his duties effectively, will be significantly impaired.

The fourth interest to be protected is the essence of the employee's duty of loyalty, the protection of a Crown employee's home ministry or agency from direct public criticism by that employee. This is an interest that has given us a great deal of concern. A number of commentators, including some in the course of our public hearings, have suggested that Crown employees should not be permitted to "go public" in respect of decisions made in their home departments — a ministry or agency, or a specific part thereof — with which they are not in agreement.[63] In effect, the argument is that, once a decision has been made internally, Crown employees should not be at liberty to challenge it in the wider public arena. The issue may be characterized as one of determining where the employee ceases to act in the capacity of private individual, and begins to act in the capacity of recalcitrant employee, who, having been disappointed by a decision duly taken inside the home department, tries to have a second chance at influencing the decision by appealing to public opinion at large. Such conduct would clearly be cause for discipline of an employee in the private sector; and the argument may be made that a situation of this kind is not sufficiently identified with the employee's interest as a private individual to justify departing from the ordinary law of employment.

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[62] *Supra*, note 56, at 136.

In the *Fraser* case, it appears that Mr. Fraser himself, in the course of his arguments on his own behalf in the Supreme Court of Canada,[64] was prepared to admit that criticism by a federal civil servant of his own department would be improper. Indeed, a substantial amount of his case was directed to creating a distinction between job-related criticism, which he conceded was improper, and non-job-related criticism.

The argument on the other side is that, from the point of view of the public interest, a restriction on home department criticism will deprive the public debate of the very best informed participants. This argument was essentially adopted by the United States Supreme Court in *Pickering v. Board of Education*,[65] and although subsequent decisions may not go quite so far,[66] it appears to remain a precept of American jurisprudence.

Among the respondents to our call for submissions, the major exception to the general willingness to concede that home department criticism may go too far in undermining the duty of loyalty of a Crown employee was the Ontario Public Service Employees Union. Relying on *Pickering* and similar judicial pronouncements, OPSEU recommended that home department criticism should lead to discipline only where it so impaired personal working relationships in the agency that the public interest in the effective operation of the agency outweighed the public interest in receiving the critical statement.[67]

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[63] Two of the public sector unions that made representations to the Commission, namely, the Ontario Liquor Board Employees Union and the Public Service Alliance of Canada, were prepared to concede the reasonableness of some restriction on home agency criticism. Moreover, s. 2(2)(c) of the proposed *Public Servants' Political Rights Act, 1982*, Bill 25, 1982 (32d Leg. 2d Sess.), a Private Member's Bill, specifically provided that the political rights of an employee were to be subject to the condition that "the employee does not speak in public or express views in writing for distribution to the public on any matter with which he is directly engaged in his employment with the Crown". Section 2(2)(c) of the proposed *Public Servants' Political Rights Act, 1986*, Bill 85, 1986 (33d Leg. 2d Sess.), another Private Member's Bill, is in virtually identical terms.

[64] *Supra*, note 56, at 130.

[65] 391 U.S. 563, 88 S. Ct. 1731 (1968), discussed *supra*, ch. 4, sec. 4(b)(iii).

[66] See discussion, *ibid*.

This, of course, is one of the interests that we have already seen fit to protect in the first three restrictions recommended above. Indeed, it is arguable that these restrictions, taken together, would, in the context of criticism of one's home department, amount to a virtual prohibition on critical comment relating to that department. Obviously, the impact of these prohibitions would be considerably heightened in relation to criticism concerning the home department, by comparison with criticism of a more distant aspect of government policy or action. The closer a Crown employee comes to his or her own base of activity, the more likely it is that concerns about conflict of interest, bias, and serious impairment of working relationships will arise.

Similarly, the more senior a Crown employee becomes, or the more closely he or she is involved with government policy, the more serious any criticism of the policy of the employee's own department becomes. We have therefore considered the possibility of extending a special restriction to Crown employees in the restricted category in respect of critical comment on one's home department, while preserving the right of such comment for other employees. On balance, however, we have decided to recommend a restriction on criticism of one's home department for all Crown employees.

The reason for this decision relates to the interest of the home department itself. The effect on the efficiency and morale of employees attempting to invoke public support in matters of internal policy would ultimately be corrosive. We do not conduct our government by plebiscite, even in respect of the central issues of public policy. The possibility that disaffected employees could appeal to the court of public opinion would ultimately lead to policy making by a form of plebiscite, and would put senior policy makers in a position of having to fight constant rearguard actions to defend policy decisions that may have been very difficult to reach in the first place. No organization could long survive having to make its policy decisions twice, once internally and once externally in the glare of public debate, sharpened by the spectacle of internal dissent becoming public.

Although we have decided to recommend a restriction on home department criticism, we do not think that such a restriction should be without safety valves. One of these safety valves, namely, relaxed standards for participation in the lawful activities of a trade union, will be discussed in the following section, while a second, namely, protection for employees who expose improper government conduct, will be dealt with in our discussion of whistleblowing.[68] The third safety valve relates to the distinction with which we began this discussion, that is, between the Crown employee as private individual and the Crown employee as employee.

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[67] See OPSEU draft legislation, *supra*, note 44, s. 9.

[68] See *infra*, this ch., sec. 7(e)(iv).

There will be occasions when a Crown employee will be affected in his or her personal capacity by a decision or action of the employee's own department; in such cases, we do not think it reasonable to impose restrictions on the individual so affected merely because that individual is also a Crown employee, while any other person affected is in no way restricted from complaining about the decision or action. An example might be a Crown employee in the Ministry of Transportation and Communications who, along with all his or her neighbours, faces the possibility of a serious deterioration of property values because of the construction of an expressway through a residential neighbourhood. Another example would be a Crown employee in the Ministry of Education whose children are adversely affected at school by Ministry policy. It would seem punitive to restrict Crown employees in these circumstances from expressing their views, since they would be clearly affected as private individuals, rather than as employees. For that reason, we have decided to make an express exception to our recommendation that would impose a restriction on home agency criticism. We therefore recommend that the following restriction should be applicable to all Crown employees:

> A Crown employee shall not engage in critical comment on government policy or government action that involves the employee's own ministry or agency, except where the policy or action directly affects the employee in his or her personal capacity.

(d) EXCEPTIONS TO THE RESTRICTIONS ON CRITICAL COMMENT

We wish now to consider two important exceptions to our recommendations relating to restrictions on critical comment. The first is designed to retain the independence and freedom of action of tribunals that perform a regulatory or adjudicative function. The second is intended to protect the participation by Crown employees in the lawful activities of a trade union.

As we have observed, many tribunals are staffed with Crown employees, the most senior of whom will fall into our restricted category. Nevertheless, the functions assigned to these tribunals, whether they are regulatory or adjudicative, will often involve weighing aspects of government policy, adjudicating between government and private individuals, or assessing government action against the constraints of the law. In such circumstances, it becomes part of the duty of these tribunals to engage in critical comment on government policy or action, and we want to make it perfectly clear that our recommendations are intended only to apply to critical comment by Crown employees in their capacity as private individuals. Where Crown employees are required to make comment as a part of their official duties, it must be the constraints of these duties alone that apply. We therefore recommend that the restrictions set out above should apply only to critical comment by employees in their private capacities, and not to employees carrying out their duties as Crown employees.

The second exception that we consider essential relates to the capability of trade unions representing Crown employees to advance the legitimate interests of those employees and to engage in confrontation with government to the extent necessary to carry out those functions.

The participation by Crown employees in the legitimate activities of trade unions may often involve critical comment that would run afoul of one or another of our proposed restrictions. For example, an employee who speaks at a local union meeting for the purpose of attacking a government policy in the employee's home department will clearly be in some danger of disciplinary action where his or her comments have deleterious effects on the working conditions in that department. Similarly, so will an elected local union official who is employed in the same department and attacks that policy in public as an undue encroachment on employee rights and working conditions.

The importance of preserving a right to participate in the legitimate activity of trade unions has been recognized on a number of occasions by studies concerning restrictions on critical comment. Thus, the Armitage Committee in the United Kingdom found that the Civil Service Department applied the rules on political activity less rigorously to staff acting in their capacity as staff association members while they were engaged in legitimate union business.[69] In its Report, examples were given of speeches at annual conventions that in any other context might be considered public comment on matters of current political controversy. Similarly, it was noted that articles in staff association journals, public statements — sometimes of a provocative nature — during industrial disputes, and even public criticism of general government policy, such as pay restraint legislation, have all been tolerated. The Committee recognized the long standing tradition "that trade unions may deploy any argument that is relevant to the legitimate interests of their members, and that it is inescapable that occasions will arise in the public service when unions and their members will criticize the policy of their employer which is in practice the government of the day".[70] The Committee recommended that this balance should continue to operate.

Similarly, in Canada, the federal Task Force on Conflict of Interest specifically recognized that matters lawfully within the subject matter of collective bargaining might be caught by a restriction on critical comment. Its recommendation[71] was, therefore, that there should be a specific exception for the exercise by employees of their rights under the *Public Service Staff Relations Act*.[72]

We do not think it is possible to define in advance all the occasions on which critical comment by public employees should be protected because they are engaged in the lawful activities of their trade unions. We recognize that the common law on this subject,[73] even as administered by public service labour relations tribunals in various jurisdictions, is still in a state of development. Nevertheless, all the cases involving union officials recognize that some protection should be accorded to them for their public utterances, and we think that this development in the law ought to be crystallized. We also think that it is not only trade union officials who need protection of this sort, but ordinary union members as well, without whose critical comment it may sometimes be impossible for such officials ever to discover what problems exist.

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[69] Armitage Report, *supra*, note 21, paras. 100-02, at 30-31.

[70] *Ibid.*

[71] D'Avignon Report, *supra*, note 48, at 47.

[72] R.S.C. 1970, c. P-35.

[73] See *supra*, ch. 3, sec. 2(b)(ii). See, also, *supra*, ch. 3, sec. 3(a)(ii)g.

We therefore recommend that the restrictions on critical comment set out above should be subject to an express exception for the participation by Crown employees in the lawful activities of a bargaining agent or employee association.

(e) PROCEDURAL CONSIDERATIONS

Basically, we recommend the same procedural approach for our restrictions on critical comment as for our restrictions on political activity. This will require adjustment of the jurisdiction of the two public service appeal boards, so that Crown employees affected by a restriction on critical comment may test the application of that restriction before the tribunal by instituting grievance proceedings, either in respect of discipline imposed because of a breach, or in respect of instructions from the employer relating to critical comment. Our earlier structural recommendation that the jurisdiction of the public service appeal boards be broadened would accomplish this objective.

Similarly, we recommend that Crown employees should be able to seek advice, in confidence, from the Special Counsel in relation to any proposed exercise of critical comment about which the employee is unsure. As in the case of advice on political activity, the Crown employee should be entitled to the protection of solicitor-client privilege, but should also be entitled to place the Special Counsel's advice before a tribunal on the same basis as described above.[74]

(f) CONCLUSION

In the preceding discussion on critical comment, we have assumed that, in making the comment, whatever its nature, the Crown employee does not disclose any government information that he or she has obtained "in confidence". In other words, we have been dealing only with critical comment that is based upon information that an employee is at liberty to disseminate to the public. We turn now to a discussion of the final aspect of our mandate, the obligations of Crown employees in respect of the disclosure of government information obtained in the course of employment.

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[74] See *supra*, this ch., sec. 5(b).

7. THE DISCLOSURE OF GOVERNMENT INFORMATION BY CROWN EMPLOYEES

(a) INTRODUCTION

The Commission's recommendations for reform with respect to the disclosure of government information by Crown employees distinguish between a Crown employee's disclosure of information in the course of his or her ordinary employment duties, and disclosure that is popularly called "whistleblowing", that is, the otherwise unauthorized or unlawful disclosure of information relating to some kind of serious government wrongdoing, where the disclosure is alleged to be in the "public interest".

The Commission recognizes the inherent, unavoidable tension between the government's need to preserve the confidentiality of certain classes of information and the public's interest in open government and in access to information held by government. One manifestation of the latter interest is the dissemination of government information by Crown employees, in order that they may perform their daily functions effectively and participate meaningfully in political and other activities. As a general proposition, it may be said that clear, comprehensible guidelines respecting such dissemination do not now exist in the Province, to the detriment of both Crown employees and the general public. It is our view that the establishment of such guidelines is long overdue.

The continuing debate concerning where the line is to be drawn for Crown employees in respect of the disclosure of government information must now be informed, at least philosophically, by the introduction of the *Freedom of Information and Protection of Individual Privacy Act, 1986.*[75] If and when it is enacted, the debate will, of course, take on a significantly new cast. While the focus of the proposed freedom of information legislation is, in large measure, the public's right of access to government information, rather than a Crown employee's right to disclose government information, the philosophical underpinnings of the legislation clearly make it more difficult for one to argue that the right of disclosure should continue to be severely restricted at the same time as the right of access is broadened.

As we have said, the *Freedom of Information and Protection of Individual Privacy Act, 1986*, has yet to be enacted. But given, we believe, its central importance to the issues discussed below, and its likely passage, at least in some form, the Commission has concluded that it is essential to make reference to its relevant provisions where they impinge on the matter of disclosure of information by Crown employees.

In earlier portions of this Report, the Commission canvassed the duty of confidentiality of Ontario Crown employees[76] and the duty of confidentiality of similar employees in other jurisdictions.[77] We also described generally the proposals of the Ontario Commission on Freedom of Information and Individual Privacy[78] and the recently proposed Ontario *Freedom of Information and Protection of Individual Privacy Act, 1986*. In the sections that immediately follow, the Commission will review briefly this earlier discussion so that our recommendations for reform may be put in their proper historical and jurisprudential perspective. We shall then outline our recommendations respecting the disclosure of information generally and, in particular, whistleblowing.

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[75] *Supra*, note 2. See *supra*, ch. 3, sec. 3(b)(i)d, and *infra*, this ch., sec. 7(c).

[76] See *supra*, ch. 3, secs. 2 and 3(b).

(b) THE OATH OF SECRECY AND THE COMMON LAW DUTIES OF LOYALTY, GOOD FAITH, AND CONFIDENTIALITY

Section 10(1) of the *Public Service Act*[79] requires that every civil servant must take an oath of secrecy that, "except as I may be legally required, I will not disclose or give to any person any information or document that comes to my knowledge or possession by reason of my being a civil servant". Public servants who are members of the unclassified service may be required to take this oath by the appropriate minister.[80] Pursuant to section 62 of the proposed *Freedom of Information and Protection of Individual Privacy Act, 1986*, the oath would be amended by inserting the words "authorized or" after "legally" in the above-quoted passage, presumably in an attempt to protect a civil servant who divulges information in accordance with the Act.

The oath, whether in its present or proposed amended form, appears to forbid any disclosure of information, except under certain, limited conditions. However, as we have said earlier, when examined, the language is ambiguous and unhelpful. It indicates no specific standard of behaviour to which civil servants must conform. If taken literally, the oath could seriously hamper the efficient operation of government; indeed, to some degree it must necessarily be breached in order for civil servants to carry out many of their duties.

But even if, as a matter of law, the oath were interpreted narrowly, thereby opening up somewhat the right of a Crown employee to release information[81] and allowing a court or tribunal to weigh the employee's conduct against the duties of loyalty, good faith, and confidentiality, the mere existence of an *apparently* comprehensive prohibition on the disclosure of government information could not but have a serious chilling effect on the activities of Crown employees. This general inhibition is reflected, in part, in their dealings with the general public on a day-to-day basis, and in their unwillingness to expose serious government wrongdoing that arguably ought, in the public interest, to be disclosed.

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[77] See *supra*, ch. 4, secs. 2(b), 3(b), and 4(b).

[78] Ontario, *The Report of the Commission on Freedom of Information and Individual Privacy: Public Government for Private People* (1980). See *supra*, ch. 3, sec. 3(b)(i)b.

[79] *Supra*, note 7.

[80] *Ibid.*, s. 10(3).

[81] See, for example, *Re Ontario Public Service Employees Union (MacAlpine) and the Crown in Right of Ontario (Ministry of Natural Resources)*, unreported (November 18, 1982, G.S.B., Jolliffe) (hereinafter referred to as "*MacAlpine*"), discussed *supra*, ch. 3, sec. 3(b)(i)a.(1)i.

The chilling effect to which we advert does, of course, serve as a hedge against the unjustifiable release of confidential information by indiscreet Crown employees. The oath, both in terms of its form and substance, has a cautionary effect on employees, reminding them, in solemn terms, of their general common law duties of loyalty, good faith, and confidentiality. To this extent, the oath has some advantage over these duties. The latter are constructs of the common law, operative after the offending event and likely never explained to employees at any time during their term of employment.

The Commission has come to the conclusion that neither the oath of secrecy nor the common law duties of loyalty, good faith, and confidentiality are effective and fair means of regulating the disclosure of government information by Crown employees. The oath of secrecy is overbroad and amorphous, lacking sufficient detail to inform an employee of his or her rights and obligations.[82] The common law duties also are unclear and ineffective as a guide to proper behaviour. Neither the oath nor the common law duties clarify sufficiently whether a lawful or unlawful disclosure has taken place until after the event and after the employee has been subject to disciplinary proceedings. They are reactive, forcing employees to speculate on the ambit of their rights and obligations. Moreover, they do not distinguish between information that, although technically confidential, is of trivial importance and, therefore, not in the government's interest to suppress, and highly sensitive information in respect of which there ought not to be a right of disclosure.[83] In order to

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[82] See, generally *supra*, ch. 3, sec. 3(b)(i)c., which discusses the concept of "open government", and the resulting Cabinet guidelines, of the former Progressive Conservative government of the Honourable William G. Davis.

[83] See *Re Ministry of Attorney-General, Corrections Branch and British Columbia Government Employees' Union* (1981), 3 L.A.C. (3d) 140 (Weiler), at 157, where Arbitrator Weiler stated:

> The employer's interest in preventing release of information would vary depending on the nature of the information (*i.e.*, how sensitive and/or confidential is the information), the position of the employee, the person to whom the information was given, the manner in which the information was released and so forth. It is for this reason that the federal Government has attempted to provide a fairly comprehensive and exhaustive set of guidelines for each department of its civil service. For there is a huge discrepancy in the employer's legitimate interest in, for example, preventing a member of its security staff from releasing to a hostile Government information concerning defense weapon deployment strategy as compared to preventing a secretary in the janitorial department from telling her mother how many paper clips her boss ordered for the next fiscal year. Yet both these employees are civil servants and the information released was gained during the course of their employment. For these reasons I cannot accept the employer's argument in this case that any release of any information gained during employment would be a breach of the oath of office warranting discipline or discharge.
>
> In my view the oath of office taken by the grievors does not provide sufficient detail to guide them concerning their obligations with respect to the release of

perform their tasks properly, employees may well feel obliged to disclose otherwise non-releasable, but trivial or non-sensitive information, but may be only too aware of their technical "disloyalty". Such subterfuge, to which a blind eye is necessarily turned, ought not to be essential to good government.

The Commission wishes to emphasize the nexus between disclosure restrictions and the notion of "good government", for the deleterious effects of a legal regime that effectively muzzles Crown employees have significant repercussions outside the immediate employment context and beyond the concerns of individual employees. If restrictions are overbroad, substantially limiting, for example, the disclosure of government information by Crown employees, there arises a danger that the business of government may be vitally, and detrimentally, affected. Even leaving aside the philosophical merits of so-called "open government", the requirements of efficient and effective administration demand a certain minimum flow of information from government to the public.

Moreover, in a democratic society, the free flow of ideas and information is essential in order to develop well-considered alternatives to government policies, to monitor government activities, to check potential abuses, and to correct government wrongdoing where it has occurred. These critically important functions cannot be performed properly if public comment and criticism are stifled, and if information evidencing serious government misconduct cannot, in effect, be disclosed.

It is for these reasons, then, that it has been necessary to examine the continuing vitality and reasonableness of the oath of secrecy and the common law duties of loyalty, good faith, and confidentiality in relation to the activities of Crown employees in Ontario. As we have said, in determining whether and, if so, to what extent, reform is necessary, the Commission has been clearly mindful that these existing restrictions must be viewed not simply from the perspective of the individual Crown employee, and his or her desire to speak out on public issues, criticize government policies or conduct, or become politically active, but also from the wider perspective of the public service as a whole, and the proper governance of this Province.

The Commission is well aware that, except for Quebec and Nova Scotia, all Canadian provinces have a general oath of secrecy. We need not repeat here our earlier discussion of the law elsewhere in Canada.[84] Suffice it to say that we

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information. The oath simply does not disclose any concrete standard of behaviour which can be expected of employees. During the hearing I requested evidence concerning how the employer explained this oath of office to employees at the point of hiring, or at any other time during their employment. No evidence was led in this regard. I also requested evidence about how the employer had enforced this obligation in the past. No evidence was forthcoming. The inference that I draw from the absence of such evidence is that the employer does not make a practice of explaining to employees the meaning of the oath nor the relevant sections of the Correctional Centre Rules and Regulations.

[84] See *supra*, ch. 4, sec. 2(b).

do not regard the retention of an oath in these jurisdictions as conclusive of its efficacy or fairness. In Nova Scotia, reliance is apparently placed almost exclusively on the common law, for there is no general oath nor any general secrecy provision governing persons in the employment of the Crown.[85]

As we have said, we are convinced that the disclosure of information by Crown employees no longer ought to be governed by the oath of secrecy, whether in its present form or as amended under the proposed freedom of information legislation. Accordingly, we recommend that the oath of secrecy should be abolished.[86]

Nor do we believe that the common law duties of loyalty, good faith, and confidentiality, while of more utility than the oath, are sufficient in themselves to ensure that the proper measure of confidentiality is maintained. For the reasons advanced above, the Commission recommends the adoption of a new statutory regime respecting a Crown employee's duty of confidentiality, a regime that would make as explicit as possible the nature and scope of a Crown employee's rights and obligations concerning the disclosure of information that comes to the employee's knowledge or possession by virtue of his or her employment. This statutory regime would essentially create a new duty of confidentiality for Crown employees. However, we believe that this regime should be supplemented by the common law duties of confidentiality, good faith, and loyalty. We shall deal with the general disclosure rules, as well as the role of the common law duties, in a subsequent portion of this chapter.

Before we examine in more detail our proposals for reform in this area, it is essential to review briefly the scheme for the disclosure of information set forth in the proposed *Freedom of Information and Protection of Individual Privacy Act, 1986.*[87] This review is necessary for two reasons. First, the Act clearly establishes a means by which the public is given a right of access to government documents and a procedure by which Crown employees may release such documents. Secondly, the Act establishes categories of information that may or may not be released under the statute. Both facets of the legislation, if and when enacted, are central to the proposals to be made by the Commission.

(c) THE PROPOSED *FREEDOM OF INFORMATION AND PROTECTION OF INDIVIDUAL PRIVACY ACT, 1986*

Leaving aside the protection of privacy, the purpose of the proposed legislation is stated clearly in section 1(a) as follows:

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[85] But see *Civil Service Act*, S.N.S. 1980, c. 3, Schedule A, which provides for an oath of secrecy to be sworn by the deputy minister of the Civil Service Commission. As well, deputy ministers apparently swear special oaths of secrecy.

[86] It should be noted that the Ontario Commission on Freedom of Information and Individual Privacy, *supra*, note 78, recommended that the oath should be abolished: see *supra*, ch. 3, sec. 3(b)(i)b.

[87] *Supra*, note 2.

> 1. The purposes of this Act are,
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> (a) to provide a right of access to information under the control of an institution in accordance with the principles that,
>
> (i) government information should be available to the public,
>
> (ii) necessary exceptions to the right of access should be limited and specific, and
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> (iii) decisions on the disclosure of government information should be reviewed independently of government;...

Part I of the Act deals with administration. It provides, for example, that an Information and Privacy Commissioner should be appointed by the Lieutenant Governor in Council on the address of the Assembly. Part II, the most important portion of the Act for our purposes, provides a right of access to government information, subject to specified exemptions. Part II also provides for a procedure to be followed in seeking access and the manner in which access is to be given. Part III deals with the protection of individual privacy by regulating the collection and disclosure of personal information. Part IV provides for an appeal to the Commissioner from a decision made under the Act. Under this Part, the onus is placed on the government to prove that information should not be released. Part V deals, *inter alia*, with fees under the Act.

As we have indicated, the critical provisions of the Act dealing with the dissemination of government information appear in Part II. Section 10 provides for a *prima facie* right of access to government information. This provision reads as follows:

> 10. Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or part of the record falls within one of the exemptions under sections 12 to 22.

It is important to bear in mind that the Act deals with access to, and disclosure of, information contained in a "record". The term is defined in section 2 to mean "any record of information however recorded, whether in printed form, on film, by electronic means or otherwise", and includes, *inter alia*, any type of "documentary material, regardless of physical form or characteristics", and, subject to the regulations, any record capable of being produced by means of computer or other similar type of technology. In other words, access to government information that is not in a "record", but is, for example, communicated orally within or outside a ministry or agency, is not regulated by the Act.

The public's general right of access is subject to a number of exemptions contained in sections 12-22. These fall into two categories. One category comprises information that a "head", that is, the relevant Minister or designated head of the relevant institution, "may refuse" to disclose, such as advice to the government (section 13(1)), matters relating to law enforcement (section 14(1)), relations with other governments (section 15), defence (section 16), economic and other related interests (sections 17(1) and 18(1)), an individual's health or safety (section 20), and already published information (section 22(a)). The other category comprises information that, under the Act, a head "shall refuse" to disclose. The latter prohibition is restricted to cabinet records (section 12(1)), broadly defined but with some exceptions, and personal information (section 21), again with several exceptions.

The relevance of describing these classes of recorded information will become clearer when we consider the alternatives for reform, not only in the general context but also in the narrower context of whistleblowing. What should be emphasized here, however, is the fact that, once the legislation is passed, the Legislature will have canvassed the types of information held by the government and will have determined whether such information must be released, may be released, or must not be released. We recognize that, under the Act, dissemination is considered only in respect of information in a "record", a matter to which we shall return; but, at this juncture, we are more interested in the essential nature of that information, and the category to which it belongs, rather than how it is manifested to members of the public.

We also noted earlier that Part II of the Act provides a rather detailed procedure for seeking access to government information and elaborates on the manner in which access is to be given. It is not essential here to consider in any detail this element of the statutory scheme. It is necessary merely to emphasize that the very existence of this procedure presumably evinces a desire to provide not simply for the dissemination of information to the public, but also for its orderly and efficient release. This predisposition is reflected in section 26 and in other portions of the Act as well. Section 26 reads as follows:

> 26. Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 25, the head of the institution to which it is forwarded or transferred, shall, subject to sections 27 and 28,[88] within thirty days after the request is received,
>
> (a) give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given; and
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> (b) if access is to be given, give the person who made the request access to the record or part thereof, or where necessary cause the record to be produced.

In other words, in the absence of a delegation of authority[89] and subject to an appeal,[90] the head alone is given jurisdiction to determine into what category the requested information falls and whether access will be granted.

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[88] Section 27 provides for extensions of time beyond the thirty day period, and s. 28 relates to special notices to affected persons where the requested information comes within ss. 17(1) or 21(1)(f).

[89] See s. 58(1), discussed *infra*, this sec.

[90] See Part IV of the Act.

Part II also provides that government institutions are required to make information available to the public, including information on how to make a request, how the institution is run and what it does, and the guidelines used by the institution in making various decisions. In addition, the head of each institution is required to make an annual report respecting the operation of the Act in relation to that institution.

Inasmuch as the Act has not yet been passed, it is obviously too early to know precisely how it will operate and what effect it will have. But certain limited observations may be made with respect to the means that may be used by government heads to determine how various kinds of government information ought to be released or kept confidential. We believe it is necessary to engage in this exercise, however speculative, in view of the importance of the matter in relation to the disclosure of information by Crown employees.

Several procedures are possible. For example, in some small branches, heads may require all staff to forward requests for information directly to them for their decision. In such a case, the head will determine whether the requested information is within the sections 12-22 exemptions and, if so, what action should be taken.

Where the branch is larger, and where the volume of recorded information is such that it is not feasible for a head to deal with every request, the head may formally delegate responsibility or establish informal policies or procedures, perhaps categorizing the information beforehand, so that subordinates need not always seek advice concerning the release of the information. Delegating responsibility to certain subordinates is, in fact, provided for in section 58(1) of the Act, which reads:

> 58.-(1) A head may in writing delegate a power or duty granted or vested in the head to an officer or officers of the institution subject to such limitations, restrictions, conditions and requirements as the head may set out in the delegation.[91]

It is not unreasonable to assume that, given the volume of recorded government information, in most cases the responsible head will turn his or her mind, at a very early stage, to the question of how requests for information ought to be dealt with. In short, the legislative regime will likely be supplemented by some delegation of authority or further administrative procedures promulgated by individual heads. As we shall see below, this anticipated attempt to deal efficiently and effectively with recorded information, and the more or less formal structure that is likely to be created as a result, will also be relevant when considering how one should deal with the disclosure of non-recorded government information, that is, information falling outside the proposed Act.[92]

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[91] The Act does not define the term "officer", the person to whom a head may delegate a power or duty. Nor does the term appear to be a term of art used to describe a particular kind of Crown employee. Presumably, the use of this term indicates an intention to have s. 58(1) read restrictively. If so, it would preclude delegation to certain lower level employees.

Before we turn to the alternatives and proposals for reform, reference should be made to two further matters, one dealing with section 60 of the proposed *Freedom of Information and Protection of Individual Privacy Act, 1986*, the other dealing with sanctions for breach of the Act. Section 60 reads:

> 60.-(1) The Standing Committee on Procedural Affairs shall undertake a comprehensive review of all confidentiality provisions contained in Acts in existence on the day this Act comes into force and shall make recommendations to the Legislative Assembly regarding,
>
> (a) the repeal of unnecessary or inconsistent provisions; and
>
> (b) the amendment of provisions that do not conform to the purposes of this Act.
>
> (2) This Act prevails over a confidentiality provision in any other Act unless the other Act specifically provides otherwise.
>
> (3) Subsection (2) shall not have effect until two years after this section comes into force.

We have already discussed briefly the various statutory non-disclosure provisions, which apply to many, but not all, Crown employees in Ontario.[93] These provisions have a narrow, although important, focus. Accordingly, the legislative results of the review contemplated by section 60 cannot take the place of a more comprehensive disclosure regime governing all government information and all Crown employees.

With respect to sanctions, it should be noted that the proposed legislation is largely silent on the consequences of a breach of its provisions. Section 57(2) provides for a fine of up to $2,000 for the unlawful release of personal information. With respect to other breaches, however, disciplinary action against the offending employee is presumably available to the Crown under ordinary employment law, with the nature and degree of any such action dependent upon the seriousness of the conduct. Where disciplinary action is taken, an employee may, of course, utilize existing grievance procedures.

(d) THE GENERAL DISCLOSURE RULES

(i) Introduction

Our discussion of the release of government information recognizes the critical distinction between general rules governing the disclosure of such information and any special rules dealing with the disclosure of information in the course of public comment or indicating serious government wrongdoing.[94] We turn first to a discussion of the general rules governing the disclosure of government information.[95]

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[92] It should also be noted that "freedom of information coordinators", advised by an "implementation team", have already been designated for each government Ministry.

[93] See *supra*, ch. 3, sec. 3(b)(i)a.(2).

(ii) Proposals for Reform

Throughout this Report, the Commission has been animated by a desire to provide, to the greatest extent possible, explicit, meaningful guidelines to Crown employees with respect to political activity, critical comment, and the disclosure of government information. As we said earlier, speculation concerning whether, and under what circumstances, Crown employees may or may not lawfully release government information ought to be supplanted by new legislation.

The Commission's recommendations concerning the regime that ought to govern the disclosure of government information start from the basic premise that, subject to a few alterations, proposed below, the essential integrity and philosophy of the disclosure regime created by the proposed *Freedom of Information and Protection of Individual Privacy Act, 1986* ought to remain inviolate. While it is clearly premature to know how the Act will operate, it is also premature and unjustified to assume that the scheme it establishes will prove wanting. Without necessarily accepting all facets of the proposed new legislation — indeed, most of the provisions are not at all germane to our study — we believe that it would not be desirable at this time to second-guess the Ontario Commission on Freedom of Information and Individual Privacy and the government policy ultimately embodied in the legislation with respect to the types of information that should be released to the public and the means by which such information is released.

The Commission recognizes that, even aside from the protection of privacy aspect of the Act, its essential focus is different from, although intimately related to, the focus of our present discussion. The proposed freedom of information regime attempts to deal comprehensively with public access to various kinds of recorded government information. But we are of the view that, with some exceptions, this regime also establishes satisfactory standards in respect of the disclosure of such information by Crown employees. Accordingly, the Commission recommends that, subject to the proposals that follow, the law relating to the disclosure of government information by Crown employees should be governed by the regime established under the proposed *Freedom of Information and Protection of Individual Privacy Act, 1986.*

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[94] With respect to disclosure in the course of a public or private comment and whistleblowing, see *infra*, this ch., secs. 7(d)(iii) and 7(e), respectively.

[95] At this juncture, brief mention should be made of the proposals and draft legislation of the Ontario Public Service Employees Union (OPSEU), prepared for the Ontario Law Reform Commission. With respect to the disclosure of information, the OPSEU draft legislation, *supra*, note 44, dealt mainly with whistleblowing. Where OPSEU went beyond this relatively narrow focus, it did so only in the context of a public or private "statement" made by a Crown employee. That is, the OPSEU draft legislation dealt with the disclosure of government information, outside the four corners of whistleblowing, only where "the employee makes a statement in public or in private concerning any political subject, or any policy or practice of government or governmental agency, or any other matter of public concern": OPSEU draft legislation, s. 4. The relevant sections dealing expressly with disclosure are ss. 5-7. We shall consider OPSEU's proposal again at a later point: see *infra*, this ch., secs. 7(e)(iii)b. and (iv).

As we have seen, under the proposed legislation, while every person has a *prima facie* right of access to all recorded government information, in the absence of delegation or, perhaps, some other type of authorization, it is only a government head who, as a legal and procedural matter under section 26, is given dispositive powers respecting the release of such information. This general right in a head to determine matters relating to disclosure means that no subordinate employee would be entitled to release any recorded government information without some type of prior authorization.[96]

The rationale for this centralization of authority to authorize the release of information presumably relates to the need to secure its orderly dissemination and to ensure that individual Crown employees do not, on their own initiative, disclose information that ought not to be disclosed. By the same token, it has been recognized that this scheme would be unworkable if employees were compelled to seek the opinion of the head each and every time a request was made for information. In theory, even trivial pieces of information would not be releasable by a subordinate without proper authorization. As a result, the principle underlying the liberalization of rights of access to government information, envisaged by the proposed freedom of information legislation, might well be frustrated.

Accordingly, as we have said, there is likely to be considerable incentive for each head to rationalize the procedure for the release of information in some way that will permit the head to retain the requisite degree of control without completely frustrating government operations. Whether a head delegates responsibility, either formally or informally, for the release of information, or indeed whether the head simply retains control in his or her own hands, subordinate employees would be sufficiently apprised of their rights and duties.

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[96] Section 26 is reproduced *supra*, this ch., sec. 7(c). It bears mentioning, however, that the Attorney General for Ontario, the Hon. Ian Scott, Q.C., has recently suggested several amendments to the proposed *Freedom of Information and Protection of Individual Privacy Act, 1986, supra*, note 2. One of the amendments, which would appear as s. 58a(2), provides as follows:

> 58a.-(2) This Act shall not be applied to preclude access to information that is not personal information and to which access by the public was available by custom or practice immediately before this Act comes into force.

In other words, under this proposed amendment, it would appear to be possible for a Crown employee who is not a head to release government information without any prior authorization from the head. Should this proposal ultimately form part of the freedom of information legislation, it would not affect the substance of the Commission's recommendation that the law relating to the disclosure of government information should be governed by the proposed Act.

Before we discuss whether the proposed freedom of information legislation ought to be amended to include more than simply information that is in a "record" and that has been specifically requested by a member of the public, we wish to consider the role of the common law duties of loyalty, good faith, and confidentiality. While we have stated that these duties, alone, do not give sufficient guidance to Crown employees with respect to disclosure, we do wish to emphasize our belief that they would not be functionless in the regime that we propose. We recommend that, under this regime, which would create a new duty of confidentiality for Crown employees, the common law duties, including the common law defences to actions brought for breach of these duties, ought to continue to apply, at least insofar as the common law is not in conflict with the new statutory disclosure provisions proposed by the Commission.

In other words, compliance with the proposed scheme would not necessarily be a defence to an action for breach of the common law duties. For example, an employee would not be justified in disclosing otherwise releasable information on a selective basis, to selected individuals, where to do so would violate the employee's duty of loyalty.

We turn now to a very basic issue respecting the nature and status of government information. Should the legal regime governing the disclosure of such information distinguish between recorded and non-recorded information, and between information specifically requested by a member of the public and information that a Crown employee wishes to release on his or her own initiative, in the absence of such a request? We ask this question because, as we have already noted, the proposed *Freedom of Information and Protection of Individual Privacy Act, 1986* deals only with access to, and disclosure of, information in a "record" that is sought by a member of the public. While there are historical and practical reasons for this somewhat narrow compass, the matter should be re-examined here in view of the broader, or at least different, perspective of the Commission's Reference.

With respect to the first-mentioned distinction, that is, between recorded and non-recorded information, we fail to see why an employee should be entitled to release a particular piece of information in a record, as defined by the proposed freedom of information legislation, but should be precluded from releasing the very same information where it does not, or does not yet, appear in this form. In our view, the rationale for releasing some kinds of information, and keeping other information secret, relates exclusively to the substance of the information and the particular circumstances of the case, not to the form in which it happens to appear. Indeed, that form may vary from time to time, depending on such factors as the idiosyncracies of the particular government branch or employee and the exigencies of the moment.

With respect to the second distinction, namely, the distinction between information that has been specifically requested by a member of the public and information that an employee wishes to divulge on his or her own initiative, without any request, the Commission has come to the same conclusion as we have in relation to recorded and non-recorded information; that is, we see no sufficient reason to distinguish the two situations. For example, a Crown employee may wish to disclose certain information to another person, notwithstanding the fact that that person, perhaps a member of the Legislature or a media reporter, has not specifically sought the information under the provisions of the proposed Act. Assuming, for the moment, that the information is authorized for release to the public, it seems unnecessarily circuitous to force the employee to request, formally, particular information under the proposed *Freedom of Information and Protection of Individual Privacy Act, 1986*, or to require a nominee or the intended recipient to make the request. On balance, we see no justification for prohibiting the employee from doing directly what he or she is lawfully entitled to do indirectly.

Accordingly, the Commission recommends that, with respect to the general law governing the disclosure of information by a Crown employee, there should be no distinction between recorded and non-recorded information, or requested and non-requested information.[97]

(iii) Disclosures in the Course of Making a Statement[98]

In the draft legislation submitted by the Ontario Public Service Employees Union (OPSEU),[99] special attention was directed to the disclosure of information in the course of making a public or private statement. Sections 4-7 of the draft Act read as follows:

> 4. Except as provided in this Act, an employer shall not take an employment reprisal against an employee because the employee makes a statement in public or in private concerning any political subject, or any policy or practice of government or governmental agency, or any other matter of public concern.
>
> 5. An employer shall not take an employment reprisal against an employee because the employee discloses information to which the public has a right of access under the *Freedom of Information and Protection of Privacy Act* in the course of making a statement referred to in Section 4.
>
> 6.-(1) An employee who in the course of making a statement referred to in

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[97] One of the amendments to the proposed freedom of information legislation, recently suggested by the Attorney General (*supra*, note 96), corresponds to the last portion of the Commission's recommendation. The amendment, which would appear as s. 58a(1) of the legislation reads:

> 58a.-(1) Where a head may give access to information under this Act, nothing in this Act prevents the head from giving access to that information in response to an oral request or in the absence of a request.

While s. 58a(1) would not deal with the disclosure of non-recorded information, it should be noted that s. 58a(2), reproduced *supra*, note 96, would presumably permit a Crown employee who is not a head to release such information so long as the information is not "personal information" and was available to the public "by custom or practice immediately before this Act comes into force".

[98] This section deals exclusively with the release of information by a Crown employee in the course of a public or private comment, and not with public comment generally. The latter is discussed *supra*, this ch., sec. 6.

[99] *Supra*, note 44.

> Section 4, seeks to disclose information referred to in Sections 12 to 22 of the *Freedom of Information and Protection of Privacy Act* may consult the Special Counsel, and the Special Counsel shall require the head of the appropriate agency to forthwith determine
>
> (a) whether the information sought to be disclosed is information referred to in Sections 12 to 22 of the *Freedom of Information and Protection of Privacy Act*, and if so
>
> (b) whether that information should be disclosed to the public.
>
> (2) Where the head of an agency indicates to the Special Counsel that the information sought to be disclosed is information referred to in Sections 12 to 22 of the *Freedom of Information and Protection of Privacy Act* that should not be disclosed to the public, the Special Counsel shall, if so instructed by the employee, forthwith bring an application in the Supreme Court for an order that the information be disclosed, and the employer shall not take an employment reprisal because of disclosure pursuant to such an order.
>
> 7. An employer shall not take an employment reprisal against an employee who discloses information referred to in Sections 12 to 22 of the *Freedom of Information and Protection of Privacy Act* otherwise than in accordance with Section 6 unless it is proven that the governmental interest in confidentiality and effective operation of the agency outweigh the public interest in obtaining disclosure.

It will be recalled that the Commission's proposed general rule concerning the disclosure of government information would preclude a subordinate employee from releasing such information without proper delegation or authorization from his or her head. Apart from any exception for whistleblowing, to be discussed below,[100] the release of the information without such delegation or authorization would entitle the employer to take appropriate disciplinary action. If adopted by the Commission, OPSEU sections 4-7 would provide an exception to the Commission's proposed rule, the exception being for information disclosed by an employee in the course of a statement, where the employee could not otherwise legitimately disclose the information in question.

While, as we shall see, the merits of a public or private comment exception may well differ depending whether the disclosed information is confidential or non-confidential, there are several general considerations that should be examined at the outset. Of critical importance, of course, is the principle enshrined in the *Canadian Charter of Rights and Freedoms*[101] that everyone has certain fundamental freedoms, including freedom of expression,[102] "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society''.[103]

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[100] See *infra*, this ch., sec. 7(e).

[101] *Supra*, note 1.

[102] *Ibid.*, s. 2(b).

The Commission has already examined in some detail the implications of the Charter in respect of the matters discussed in this Report.[104] While we need not repeat that discussion here, a few of its salient features should be re-emphasized. For example, it bears repeating that the courts, including the Supreme Court of Canada, have stressed that a liberal approach ought to be adopted in interpreting the rights and freedoms guaranteed by the Charter. Concomitantly, any infringement of these rights and freedoms will have to be justified under section 1 on the basis of satisfying a very onerous standard of proof. The courts regard the fundamental freedoms as of central, even paramount, importance; accordingly, they require very cogent and persuasive evidence that the nature and scope of the interference with such freedoms is sufficiently important in a free and democratic society.

In assessing the interest served by a restriction on an employee's freedom to disclose government information in the course of a comment, reference must be made to the governmental interest in the orderly dissemination of information, as exemplified by the scheme established under the proposed *Freedom of Information and Protection of Individual Privacy Act, 1986*, and, with some modifications, adopted by the Commission. Any regime that, as an exception to the general disclosure rule, would permit Crown employees to release government information during a public or private comment would involve a departure from the framework of the proposed Act.

Other factors are also pertinent to the weighing of the governmental interest in the orderly release of information and the employee's interest in preserving the full range of his or her freedom of expression. For example, it may be impossible for many employees to guard against disclosure while making a comment. Leaving aside statements prepared prior to delivery, where the employee has an opportunity to assess whether any government information will be disclosed, it may not be realistic to expect an employee to interrupt a comment in mid-sentence in order to determine whether the information that is about to be disclosed was or was not authorized to be released. And, in many instances, the information may be an amalgam of work-related information and private opinion, not easily severed in the course of making a statement, whether prepared in advance or delivered extemporaneously.

On the other hand, permitting the release of information when making a speech in the context of a regime where, as proposed earlier, the general rule precludes the disclosure of any information without proper authorization from the employee's head, may create an incentive on the part of employees always to couch their disclosures in the course of a public or private comment. The employee would be protected, and the requirement of prior authorization would be circumvented, by means of this relatively simple expedient. Aside from questions concerning what constitutes a statement or comment, there may appear to be a rather large measure of artificiality involved in this exercise.

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[103] *Ibid.*, s. 1.

[104] See *supra*, ch. 3, sec. 4. For a brief general discussion of the American position in respect of the First Amendment's guarantee of free speech, see Vaughn, "Statutory Protection of Whistleblowers in the Federal Executive Branch" (1982), 3 U. Ill. L. Rev. 615, at 637 *et seq*.

As we indicated earlier, there may be a meaningful distinction between the release of non-confidential information and the release of confidential information in the context of a public or private comment. In the case of non-confidential information, referred to in OPSEU section 5, the government has, by definition, no interest in maintaining the confidentiality of the information itself. Rather, the essential governmental interest lies in its orderly release.

The same cannot be said of the disclosure of confidential information. Indeed, some information is beyond the power of a head to release, even under the procedural regime established by the proposed freedom of information legislation. Moreover, the government has already determined that there should be no review by the proposed Information and Privacy Commissioner of a head's discretion under sections 12-22.[105]

The OPSEU proposals acknowledge the difference between the two major classes of government information created by the proposed freedom of information legislation. With respect to non-confidential information, to which the public has a right of access under that legislation, OPSEU section 5 provides that an employer may not take disciplinary action against an employee who discloses such information in the course of making a public or private statement. In the case of confidential information, an employee may seek to shield himself from disciplinary action by resorting to the Special Counsel and, ultimately, to the court. However, it is significant that the OPSEU draft legislation also creates, in section 7, a public interest defence that may be invoked where the employee does not utilize the Special Counsel procedure.

The Commission sees substantial danger in permitting a public interest defence to the disclosure by Crown employees of confidential information that does not evidence serious government wrongdoing. Employees would, of course, initially disclose the information at their peril. If they proved to be wrong in their assessment of the balance between the governmental interest and the public interest, they would be subject to an employment reprisal. Nevertheless, in such circumstances, the confidential information, which may be highly sensitive, would already have been released.

On balance, the Commission has come to the conclusion and, accordingly, recommends, that no exception to the proposed general disclosure rules should be made where an employee discloses confidential government information in the course of making a public or private comment. We are not convinced that the public interest defence ought to be invoked in respect of any disclosure short of whistleblowing. Moreover, we are of the opinion that the Special Counsel procedure propounded by OPSEU involves an unwarranted departure from the philosophy and procedure contained in the proposed freedom of information legislation. The argument that freedom of expression is paramount and inviolable cannot, we believe, be maintained where the government information sought to be released is within the sections 12-22 exemptions. To permit disclosure in the latter situation, as an exception to a general rule that would demand prior authorization in all cases, may result in the release of a substantial amount of information that a head, if he or she had had the opportunity to deal with it, would have refused to release or, indeed, could not have released if it were subject to a mandatory exemption. Moreover, as noted earlier, even the proposed Information and Privacy Commissioner would have no right to order the disclosure of confidential information on the grounds public interest.[106] The lawful release of such information would also give a Crown employee an advantage unavailable to other members of society, an advantage that might be particularly important in the context of a political debate or some other activity in which the information is to be used exclusively by the employee.

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[105] Section 46(1) provides, *inter alia*, that "the exercise of the discretion of a head to disclose or refuse to disclose a record which is found to be included under an exemption in section 13, 14, 15, 16, 17, 18, 19, 20 or 22 is not appealable".

In our view, the potential for abuse outweighs any theoretical justification for endorsing an exception for the release of sections 12-22 information when making a statement. In short, the Commission has concluded that the governmental interest in the integrity of the proposed freedom of information regime and in the confidentiality of certain kinds of information, to be assessed by the proper head, outweighs the employee's freedom of expression.

In the case of non-confidential information, to which the public has a right of access, the Commission believes that it is far more difficult to weigh the competing interests and determine the most desirable outcome, both practically and constitutionally. Yet, notwithstanding the central importance attached to freedom of expression, the Commission recommends that no exception to the proposed general disclosure rules should be made where an employee discloses, in the course of making a public or private comment, non-confidential government information that has not been authorized for release to the public.

We believe that the scheme of the proposed freedom of information legislation ought not to be altered by means of this kind of exception. We are concerned, as we said before, that employees might use this exception to circumvent the proposed prior authorization of a head. It should not be possible to do so by means of the simple device of couching an unauthorized disclosure in a public or private statement.

(e) WHISTLEBLOWING

(i) Existing Restrictions and the Common Law

Earlier in this Report, the Commission examined existing restrictions on a Crown employee's right to expose serious government wrongdoing without being subject to disciplinary or other reprisals. We canvassed the oath of secrecy under section 10(1) of the *Public Service Act*[107] and the effect of section 4 of the federal *Official Secrets Act*[108] and section 111 of the *Criminal Code*.[109] We have also seen that the common law imposes specific duties on an employee in respect of the release of information acquired on the job.[110] The common law duties of loyalty, good faith, and confidentiality attempt to ensure that employees will not do anything, including disclose confidential information, that may prejudicially affect their employer's business. At the same time, the common law has developed, albeit somewhat hesitatingly and under relatively limited circumstances, a so-called "public interest" defence to disciplinary action against whistleblowers.[111]

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[106] See *ibid*.

While we have already examined the common law respecting whistleblowing, a brief review is appropriate at this juncture in order that our proposals for reform may be better understood.

In *Gartside v. Outram*,[112] Sir William Page-Wood V.-C. first enunciated the general principle that "[t]here is no confidence as to the disclosure of iniquity". The servant's common law duty to guard his master's secrets does not apply where the effect would be to deprive the public of knowledge of serious wrongdoing.[113]

In the case of *Initial Services Ltd. v. Putterill*,[114] Lord Denning M.R. formulated an expansion of the principle by holding that the servant is free to disclose "any misconduct [committed or planned] of such a nature that it ought in the public interest to be disclosed to others". Lord Denning M.R. added:[115]

> The disclosure must, I should think, be to one who has a proper interest to receive the information. Thus it would be proper to disclose a crime to the police; or a breach of the *Restrictive Trade Practices Act, 1956*, to the registrar. There may be

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[107] *Supra*, note 7. See *supra*, ch. 3, sec. 3(b)(i)a.(1)i.

[108] R.S.C. 1970, c. O-3. See *supra*, ch. 3, sec. 3(b)(ii)b.

[109] R.S.C. 1970, c. C-34. See *supra*, ch. 3, sec. 3(b)(ii)a.

[110] See *supra*, ch. 3, sec. 2.

[111] One author has suggested that, as a result of this defence, employers face a risk where their conduct is contrary to the public interest; however, "the risk is seriously diminished by the absence of appropriate protections for employees who attempt to safeguard the public interest...": Cripps, "Protection from Adverse Treatment by Employers: A Review of the Position of Employees Who Disclose Information in the Belief that Disclosure is in the Public Interest" (1985), 101 Law Q. Rev. 506, at 506-07.

[112] (1856), 26 L.J. Ch. 113, at 114, 28 L.T.O.S. 120.

[113] See Cripps, *supra*, note 111, at 526, *n*. 109, where the author states that, on the basis of *Gartside*, "it might be argued that an obligation of confidence cannot come into existence in the first place in relation to information which ought in the public interest, to be revealed to those to whom employers have not authorized disclosure".

[114] [1968] 1 Q.B. 396, [1967] 3 All E.R. 145, at 148 (C.A.) (subsequent reference is to [1967] 3 All E.R.).

[115] *Ibid.*, at 148.

> cases where the misdeed is of such a character that the public interest may demand, or at least excuse, publication on a broader field, even to the press.

The requirement that the disclosure should be only so wide as to secure correction of, or punishment for, the wrongdoing arises from the fact that, in recent times, the English courts have proceeded generally on the basis that the whistleblowing employee has, in fact, breached his or her overarching duties of confidentiality, loyalty, and good faith to the employer. As a result, the courts have engaged in a balancing of competing interests, namely, the employer's right to the performance of the common law duties by the employee, the employee's freedom of expression or right to inform the public of wrongdoing, and the concomitant public interest in having the wrongdoing exposed. This need to balance competing interests is buttressed by the fact that employers normally seek equitable relief, usually an injunction, which requires the courts to take this approach. The fact that the courts have held that whistleblowers have breached their common law duties has allowed the courts to scrutinize more carefully the nature, scope, manner, and time of the disclosure, as well as the seriousness of the misconduct or impugned action, and to weigh these factors against the need to maintain confidentiality and loyalty in the workplace.

For example, whistleblowing associated with vituperation,[116] directed to a wider audience than necessary,[117] occurring at a time particularly embarrassing to the employer, or done publicly so as to embarrass those allegedly responsible before peers or subordinates, would all be factors to be weighed in deciding whether or not the employer did dismiss or otherwise discipline the employee with just cause. Thus, in the Ontario Grievance Settlement Board case of *MacAlpine*,[118] Arbitrator Jolliffe, speaking for the majority, upheld the views of Arbitrator Weiler in *Re Ministry of Attorney-General, Corrections Branch and British Columbia Government Employees' Union*,[119] that an employee has a duty, in Arbitrator Jolliffe's words, "to be sure of his facts" before whistleblowing and to "exercise good judgment in acting on his knowledge".[120] For example, "[i]f an internal avenue of redress or investigation is open to him, the employee must consider whether that alternative is appropriate, not because the truth should be hidden but because the internal remedy may be the most effective".[121] Also, recourse to the internal remedy, in the absence of any compelling reason to do otherwise, may be said to be required by the general duties of confidentiality, good faith, and loyalty.[122]

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[116] See, for example, *Re Ministry of Attorney-General, Corrections Branch and British Columbia Government Employees' Union*, *supra*, note 83.

[117] Reference should be made to Lord Denning M.R.'s "proper party" test, in *Initial Services Ltd. v. Putterill*, *supra*, note 114. See, also, Cripps, *supra*, note 111, at 532.

[118] *Supra*, note 81.

[119] *Supra*, note 83, quoted extensively at 67-69 of the *MacAlpine* decision, *supra*, note 81.

[120] *MacAlpine*, *supra*, note 81, at 84.

[121] *Ibid.*

[122] See, generally, Cripps, *supra*, note 111, at 528-33.

(ii) In Defence of Whistleblowing

In attempting to assess whether the law ought to protect whistleblowers from disciplinary action, it must be borne in mind that any such rule would necessarily operate as an exception to the more general duties, whether common law, statutory, or contractual, respecting the fidelity of an employee to an employer and the confidentiality with which the employee is required to hold information acquired in the course of his or her employment. The justification for these duties, in both the public and private sphere, need not be reviewed here. Suffice it to note that they remain important cornerstones of employment law.

But, having said that, the Commission does not wish to create the impression that these duties are inviolable and immutable. Indeed, as we have seen, the common law itself has created exceptions to the general rule where warranted in the public interest.

It is precisely the public interest element of the common law defence that we wish to emphasize in our support of the principle of whistleblowing. Whatever the precise grounds for disclosing government information, whether it be illegality, criminality, fraud, mismanagement, danger to public health or safety, or some other activity, we start from the proposition that the disclosure of such information, even if it is otherwise characterized as confidential, may be justified wherever some higher purpose, namely, the public interest, is served.[123]

If, today, government can no longer justify confidentiality for all information — and the proposed new freedom of information legislation bears witness to this significant development — then we cannot see how the principle of confidentiality can be invoked in order to cover up serious government wrongdoing. The modern movement toward increased access to, and disclosure of, government information is founded, at least in part, on the perceived needs of a democratic state for openness and for the free exchange of ideas and information. Public awareness of government activity is seen as an essential means of monitoring, and holding the government accountable for, such activity. Is it reasonable, then, to frustrate the purpose of a more liberal access and disclosure regime precisely where serious government wrongdoing is alleged?[124]

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[123] See Cripps, *ibid.*, at 522, where the author discussed the contractual duty of an employee to obey a "lawful and reasonable order" of the employer, as stated in *Laws v. London Chronicle (Indicator Newspapers) Ltd.*, [1959] 1 W.L.R. 698 (C.A.), at 700. She observed, however, that "[a]n order to refrain from disclosing information which the public has an interest in receiving may be neither lawful nor reasonable" (*supra*, note 111, at 522).

[124] See Vaughn, *supra*, note 104, at 617, where the author briefly considered the use of the American federal Freedom of Information Act, 5 U.S.C. § 552 (first enacted in 1966) as an ethical justification for whistleblower protection. He noted that, "[u]sing the Freedom of Information Act, whistleblowers could justify the release of information as a vindication of the rights of the public". See, also, Alaska Stat. § 39.51.020 (1980), which links whistleblower protection to freedom of information legislation.

The Commission recognizes the tension between the need for loyalty and confidentiality in the workplace and the need of the public to be alerted, as a form of protection, where wrongdoing has taken place. We are well aware that a regime that protects from disciplinary or other action those employees who allege misdeeds without sufficient evidence, or who allege misdeeds that are, in fact, trivial and inadvertent, is one that may foster more harm than good. The purpose of the existing common law defence for whistleblowing is not to grant a safe haven for those wishing to engage in personal vendettas or fishing expeditions or to embarrass an employer where such action has nothing to do with the public interest. That is why so many courts and commentators stress the importance of exhausting internal channels before encouraging, or at least protecting, whistleblowers: the ultimate purpose is to secure good government or proper administration, to right a past wrong or to ensure that a potential wrong is not perpetrated, not to expose misconduct in a vacuum, for its own sake.[125]

The Commission has come to the conclusion and, accordingly, recommends that, as a general principle, whistleblowers should be protected from disciplinary or other action where they disclose government information that ought, in the public interest, to be disclosed. We believe that the legitimation of whistleblowing is consistent with recent trends and philosophy in Ontario respecting access to, and disclosure of, government information and will help, ultimately, to secure good government in this Province.[126]

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[125] See Vaughn, *supra*, note 104, at 616-17, where the author discussed several different, although related, justifications for the statutory protection of whistleblowers. One rationale is "institutional control", with exposure of misconduct helping to limit abuses of power and to set proper standards of conduct. Another rationale is related to the "fairness of protecting employees who expose corruption and wrongdoing".

Vaughn later emphasized "the importance of personal responsibility" (*ibid.*, at 666). He maintained that the "issue is simply not the balancing of individual and institutional interests but the need to support personal responsibility in order to ensure that institutional practices comply with stated standards" (*ibid.*).

However, Vaughn also noted several problems associated with the protection of whistleblowers (*ibid.*, at 617):

> Excessive protection for whistleblowers, however, may seriously interfere with the legitimate operations of a bureaucracy. Because principle does not motivate all whistleblowers, whistleblowing can occur for spiteful or petty reasons. It also may be an attempt by an employee to insulate himself from disciplinary or other personnel actions. Moreover, independent employee action threatens the framework of law, regulation, and policy which controls the release of government information and protects the interests of third parties. Unbridled individual discretion, therefore, can seriously hamper an agency's efforts to accomplish its goals.

[126] Securing "good government" may also involve a greater public awareness of the role of whistleblowing in controlling the government. Vaughn noted that the "success of the [whistleblowing] provision depends upon a change in the administrative environment" (*ibid.*, at 663-64). He went on to state that, "[i]f agencies recognize the legitimacy of whistleblowing, employee actions are likely to receive tolerant treatment and agency procedures will recognize the limits of institutional loyalty" (*ibid.*, at 664). He also said that "[t]raining and education must link whistleblower protection to the agency's own self-interest..." (*ibid.*).

We turn now to consider alternatives for reform in respect of whistleblowing by Crown employees. In a subsequent section, we shall offer our proposals for the regime that, we believe, ought to govern this activity.

(iii) Alternatives for Reform

a. Reliance on the Common Law Defence Alone

Under existing law, the chilling effect of the oath of secrecy, the *Official Secrets Act*,[127] and the common law duties of loyalty, good faith, and confidentiality are such as to reduce to a minimum the likelihood that even a conscientious Crown employee will disclose any wrongdoing by his employer, however serious.[128] While the abolition of the oath, as we have proposed,[129] would clearly remove a very significant obstacle to whistleblowing, ultimately it would not serve to legitimize that activity in all cases where we believe the public interest requires, or at least should condone, it. The employee's common law defence to disciplinary or other action by an employer, or any attempt to rely on the common law action for wrongful dismissal,[130] would remain a reactive measure, compelling an employee first to place his job and financial security in jeopardy in the hope that he will not be punished, or, if he is, that ultimately he will be vindicated. But vindication may well be inadequate to restore the *status quo ante*. Where the employee's action has detrimentally affected his relations with his employer, such that no working rapport can be restored,[131] the employee's reinstatement may be impracticable, even if the common law were more disposed in principle to granting such relief.[132]

The Commission, therefore, has come to the conclusion that, taken alone, the common law defence for whistleblowing is both uncertain and inhibiting,[133] and, therefore, an unsatisfactory vehicle to protect a Crown employee who discloses government wrongdoing in the public interest. Moreover, we have some concern that the proposed freedom of information legislation, which sets forth the principles and procedures respecting the disclosure of recorded government information, may inadvertently give the impression that it is exhaustive in its scope and, consequently, that it precludes or supplants the common law defence for whistleblowing.

The Commission's view, that the right of an employee to disclose government wrongdoing must be placed on a more solid foundation than that now provided by the common law, is shared by many who have made submissions to the Commission in the course of our Project. One submission, that of the Ontario Public Service Employees Union,[134] deserves separate treatment here, for we believe that, insofar as it relates to whistleblowing, its governing principles and recommended procedures are instructive. Accordingly, we turn in the following section to a discussion of the OPSEU proposals and the American legislation that helped to inform those proposals.

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[127] *Supra*, note 108. See, also, s. 111 of the *Criminal Code*, *supra*, note 109.

[128] See *supra*, note 111.

[129] See *supra*, this ch., sec. 7(b).

[130] See Cripps, *supra*, note 111, at 521-23.

[131] See *ibid.*, at 527.

[132] See *ibid.*, at 522 and 532-33.

[133] See *ibid.*, at 533 and 538-39.

b. The United States Civil Service Reform Act and the OPSEU Special Counsel Proposals

As we have seen,[135] in 1978 the United States Congress passed the Civil Service Reform Act.[136] One objective of the legislation was to provide a means by which a broad range of federal government employees[137] could anonymously disclose information allegedly evidencing serious wrongdoing on the part of the government. Another objective was to protect such employees from specified "personnel actions" initiated against them on account of their disclosure of government wrongdoing. In order to achieve these objectives, Congress established the Office of the Special Counsel, which, along with the Merit Systems Protection Board, the Office of Personnel Management, and the various government agency heads, have the task of implementing the Act.

We need not review here our previous discussion of the Civil Service Reform Act and the various roles of the Special Counsel contemplated by that Act. Suffice it to isolate several of its more salient features.

The three main functions of the Special Counsel are (1) to investigate allegations of prohibited "personnel actions" and, if warranted, to institute "corrective action"; (2) to provide a means by which allegations of serious government wrongdoing may be aired anonymously by employees; and (3) to uphold the integrity of the merit system through such measures as prosecuting Hatch Act[138] violations.[139]

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[134] *Supra*, note 44.

[135] See *supra*, ch. 4, sec. 3(a).

[136] Pub. L. No. 95-454, 92 Stat. 111, codified in scattered sections of 5 U.S.C. (1982): see 5 U.S.C. §§ 1206-08 and 2302. See, generally, Vaughn, *supra*, note 104.

[137] The legislation does not cover a position excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character. The President is also given wide authority to exclude any other position if he or she is satisfied that "it is necessary and warranted by conditions of good administration". See 5 U.S.C. § 2302(a)(2)(B)(ii). See, also, Vaughn, *supra*, note 104, at 633-34.

[138] 53 Stat. 1147 (1939), and 54 Stat. 767 (1940), as amended in scattered sections of 5 U.S.C. and 18 U.S.C. (1982). This Act limits the political activities of federal government employees and proscribes specified abuses of office. See *supra*, ch. 4, sec. 4(a)(iii)a.

[139] See "Statement of K. William O'Connor, Special Counsel of the Merit Systems Protection Board, [to the] Subcommittee on Civil Service of the Committee on Post Office and Civil Service [on H.R. 4033, The Whistleblower Protection Act of 1986]", House of Representatives, February 20, 1986, at 44-47, in *Hearings Before the Subcommittee on Civil Service of the Committee on Post Office and Civil Service*, House

With respect to those wishing to expose government misconduct, the Act provides that, where an employee discloses information to the public, rather than to the Special Counsel, he or she is protected[140] where the employee "reasonably believes" that the information evidences

> (i) a violation of any law, rule, or regulation, or
>
> (ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,
>
> if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.

Where disclosure is made to the Special Counsel,[141] the qualification in the closing flush of the above section does not apply. The wider protection provided to an employee in the latter case is designed to encourage employees to exhaust other institutional channels before "going public".[142]

The Special Counsel may require the appropriate agency head to investigate the employee's allegation and submit a report where the Special Counsel believes that there is a "substantial likelihood" that the employee's information discloses the kind of government wrongdoing noted above.[143] The agency head's report must, among other things, describe the conduct of the investigation, list any wrongdoing, and set forth what action has been taken or is planned.[144] The Special Counsel must forward the report to the President, to Congress, and, generally, to the whistleblower. Where no report has been submitted to the Special Counsel within the prescribed time, the whistleblower's information, as well as a statement indicating the failure of the head to submit a report, may be sent by the Special Counsel to the President and to Congress.[145]

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of Representatives, 99th Cong., 2d Sess., February 20 and 21, 1986 (published in looseleaf form) (hereinafter referred to as "Hearings").

[140] 5 U.S.C. § 2302(b)(8)(A).

[141] Or to the Inspector General of an agency, or an employee designated by an agency head to receive such information: *ibid.*, § 2302(b)(8)(B). Under the Inspector General Act of 1978, Pub. L. No. 95-492, 92 Stat. 1101 (1978), as am., Congress created a mechanism for the establishment within each agency of government of an "Inspector General", who would be charged with the internal investigation of complaints and allegations made by employees of that agency.

[142] See Vaughn, *supra*, note 104, at 621.

[143] 5 U.S.C. § 1206(b)(3)(A).

[144] *Ibid.*, § 1206(b)(4). Where no such investigation is required, the head must still report to the Special Counsel "what action has been or is to be taken and when such action will be completed", and the Special Counsel is then required to inform the complainant of this report: *ibid.*, § 1206(b)(7).

[145] *Ibid.*, § 1206(b)(5)(A).

The Special Counsel must also maintain and make available to the public a list of noncriminal matters that have been referred to agency heads. Any report submitted by the head of the agency must be included. The public list must not contain information the disclosure of which is prohibited by law or by Executive order.[146]

The Special Counsel is required to review the head's report and determine whether the report contains the information required, and whether the findings "appear reasonable".[147] Where the Special Counsel determines, upon reasonable grounds, that disciplinary action has been taken for whistleblowing in a manner that requires "corrective action", he must report such a determination, together with his recommendations, to the Merit Systems Protection Board, the agency involved, and the Office of Personnel Management.[148] If, after a reasonable time, the agency has not taken the corrective action recommended, the Special Counsel may make an application to the Merit Systems Protection Board to consider the matter and to make an order for appropriate corrective action.[149]

In the years following the establishment of the Office of the Special Counsel, the Office has not been without its critics. It has been accused of a lack of zeal in pursuing meritorious claims and an undue deference to governmental accounts of alleged incidents of wrongdoing and of reprisals allegedly taken after their revelation.[150] Critics have suggested a number of reforms. For example, it has been argued that a solicitor-client relationship should exist between the Special Counsel and government employees, and that the anonymity of those who bring complaints to the Special Counsel should be guaranteed, a proposal that the present Special Counsel has endorsed.[151]

In its Submission to the Ontario Law Reform Commission,[152] the Ontario Public Service Employees Union recommended the establishment in Ontario of a separate Office of Special Counsel, which would serve all would-be public sector whistleblowers[153] in the context of a solicitor-client relationship. By following the Special Counsel procedure in regard to the disclosure of information indicating government wrongdoing, an employee, under OPSEU's whistleblowing regime, would be insulated from any employment reprisals. The government wrongdoing to which OPSEU's draft Act is directed is defined in terms identical to the American legislation, with the noteworthy addition of a basket clause specifying "other wrongdoing that ought in the public interest to be disclosed".[154]

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[146] *Ibid.*, § 1206(d).

[147] *Ibid.*, § 1206(b)(6).

[148] *Ibid.*, § 1206(c)(1)(A).

[149] *Ibid.*, § 1206(c)(1)(B).

[150] The Office has responded to its critics by maintaining that the problem lies not with any lack of diligence on its part or on the part of its staff, but with the legislation and case law under which the Special Counsel must operate. See *Hearings Before the Subcommittee on Civil Service of the Committee on Post Office and Civil Service*, House of Representatives, 99th Cong., 1st Sess., May 15, June 18 and 26, 1985, Serial No. 99-19. See, also, Hearings, *supra*, note 139.

[151] See, generally, Hearings, *supra*, note 139.

[152] *Supra*, note 44.

[153] OPSEU did not exclude any Crown employees, such as those in policy making or confidential positions. See *supra*, note 137, concerning the American position.

OPSEU did not presume to create an exhaustive list of prohibited employment reprisals, an approach that has been the bane of the American system. OPSEU also turned its mind to the qualification in the American model dealing with disclosure that is "specifically prohibited by law" or that is required by "Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs".[155] OPSEU appeared to accept the principle that such a qualification was undesirable where disclosure was made to the Special Counsel.[156] Under the OPSEU draft, the release of "confidential" information, which is considered in terms of sections 12-22 of the proposed *Freedom of Information and Protection of Individual Privacy Act, 1986*,[157] is possible under certain circumstances. OPSEU has provided an elaborate mechanism, including application to the court by the Special Counsel, for the release of such information to the public.[158]

Where, on his or her own motion, an employee wishes to disclose confidential information to the public for the purpose of whistleblowing, under the OPSEU scheme the employee would take his or her chances under proposed section 28 of the OPSEU draft Act, which creates a public interest defence.[159]

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[154] See s. 27(c) of the OPSEU draft legislation, *supra*, note 44. This provision was inspired by the recent trial in England of Mr. Clive Ponting, a former civil servant in the Ministry of Defence, who was charged under s. 2 of the *Official Secrets Act 1911*, 1 & 2 Geo. 5, c. 28 (U.K.). Mr. Ponting disclosed classified material indicating that the government had misled the House in regard to the "General Belgrano affair". See *The Times*, London (February 6, 1985), at 2, and Ponting, *The Right to Know* (1985), ch. 2. OPSEU did not believe that the language of the American legislation would cover this type of disclosure. With respect to the Ponting case, see *supra*, ch. 4, sec. 3(b)(i).

[155] The qualification, dealing with disclosure to the *public*, appears in 5 U.S.C. § 2302(b)(8)(A), reproduced *supra*, text following note 140. See Vaughn, *supra*, note 104, at 628 *et seq*.

[156] See 5 U.S.C. § 2302(b)(8)(B), dealing with disclosure to the Special Counsel in the American Act.

[157] *Supra*, note 2.

[158] See ss. 32-36 and 41 of the OPSEU draft legislation, *supra*, note 44.

[159] Section 28, dealing essentially with the release of confidential information, provides as follows:

> 28. An employer shall not take an employment reprisal against an employee who
>
> (a) discloses information referred to in Section [27] or 32(2)(b) to any person other than the Special Counsel, or

We now turn to our proposals for reform in respect of whistleblowing by Crown employees. Given the importance of the OPSEU draft legislation in light of our own recommendations for reform, we shall make further reference to such legislation in the course of our discussion.

(iv) Proposals for Reform

The Commission believes that an attempt must be made to protect Crown employees who resort to whistleblowing where it is in the public interest to disclose the pertinent government information, whether confidential or non-confidential. At the same time, it is essential to ensure that over-zealous employees do not abuse what we consider to be an essentially extraordinary right to release such information. As we have seen, to further these ends, the Ontario Public Service Employees Union has recommended the enactment of whistleblowing legislation that combines some elements of the Special Counsel procedure existing in the United States, as well as many new features not part of the American provisions.

The Commission has already recommended the creation of a new Office of Special Counsel, with the Special Counsel to be appointed by the Lieutenant Governor in Council on the address of the Legislative Assembly.[160] Since the Special Counsel would, then, be responsible to the Legislative Assembly, the institutional independence of the Office would be ensured.

In previous sections of this chapter, we have proposed that the Special Counsel should exercise certain functions in relation to political activity and critical comment on the part of Crown employees.[161] We also envisage that the Special Counsel will exercise important functions in relation to whistleblowing, and recommend that employees should be protected when they invoke the formal Special Counsel procedure, to be discussed below.

In order to put our proposed Special Counsel procedure in perspective, a brief overview of the main elements of the scheme is necessary. Aside from a purely advisory procedure, to be discussed below, we envisage the creation of a more formal procedure that would both legitimize the disclosure to the public of serious government wrongdoing and, at the same time, protect the employee who makes such a disclosure. With respect to the means by which these goals would be realized, we begin with the initial release of information by an employee to the Special Counsel: where the employee reasonably believes that such information evidences government wrongdoing that ought, in the public

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> (b) instructs the Special Counsel to disclose information to the public under Section 33(a),
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> unless it is proven that the governmental interest in confidentiality outweighs the public interest in obtaining disclosure.

Arguably, the public interest defence provided in s. 28 is wider than that afforded by the common law: see *supra*, this ch., sec. 7(e)(i).

[160] See *supra*, this ch., sec. 1.

[161] See *supra*, this ch., secs. 5(b) and 6(e).

interest, to be disclosed, the employee would be protected. Not only would he or she be protected directly and expressly by statute, but the employee would be protected because of the confidential, solicitor-client relationship that would exist between the Special Counsel and that employee.

The disclosure by the employee to the Special Counsel would initiate a train of events designed to screen an employee's allegation, to alert the proper government official to those allegations that have not been rejected by the Special Counsel, to prompt an inquiry into the allegation prior to disclosure to the public, to ensure that confidential information is disclosed only where warranted in the public interest, as determined by the court, and to have the information made public where, again, the public interest justifies publication.

The Special Counsel would first be given an opportunity to assess whether the employee's information does, in fact, disclose information evidencing government wrongdoing that ought, in the public interest, to be disclosed. If so, the Special Counsel would be required to forward the information to the appropriate government head, who in turn would be obligated to report to the Special Counsel on the merits of the allegation and what has been or will be done if the allegation does disclose government wrongdoing.

Where the government head determines that the employee's information, or information that the government possesses and that would otherwise be required to be included in the report, is confidential and should not be disclosed to the public, it would be possible for the Special Counsel, on the employee's instructions, to apply to the court for an order releasing the information. The court would be required to determine whether the public's interest in disclosure outweighs the government's interest in confidentiality.

Where the employee's information and the information in the agency head's report to the Special Counsel are not confidential, or have been declared to be releasable by the court, the Special Counsel would be under a duty to maintain a special file containing this information and to make it available to the public. However, we would give the Special Counsel the power to deny public access to this information where, in his or her view, it would not be in the public interest that the information be so disclosed.

The institutionalization of the Office of Special Counsel would serve, then, to permit legitimate whistleblowing, ensure the anonymity, as much as possible, of whistleblowing employees, and immunize such employees from disciplinary or other measures under appropriate circumstances. Moreover, the Special Counsel scheme to be proposed by the Commission would contribute to effective government by alerting the appropriate government agency to the allegation of wrongdoing and by giving the agency an opportunity to reply to it and rectify the matter if necessary. By requiring agencies to respond at the outset, by avoiding, in proper cases, the public disclosure of confidential information, and by publishing such information only where so ordered by a court, the scheme recommended by the Commission would be consistent with the underlying thrust of the proposed freedom of information regime. Finally, if, in the public interest, otherwise confidential information must ultimately be made public, using the institution of the Special Counsel would ensure that the views of both sides are satisfactorily represented.

The Commission's recommendation to adopt a type of Special Counsel procedure does not distinguish between different categories of Crown employees, as does the American legislation.[162] One commentator has suggested that the exclusion of certain public servants from the protection afforded by the Civil Service Reform Act[163] in the United States was "because the risk of disruption [of policy making and confidential relationships] outweighed the congressional desire for disclosure".[164]

We do not agree with this approach. In the first place, it is precisely those employees in the excluded categories under the American legislation who may have easier access to critical information that may evidence serious government wrongdoing. To preclude them from taking advantage of the statutory protection would be to muzzle a very knowledgeable segment of public sector employees. In the second place, our proposals, set forth below, will require the whistleblower to have a reasonable belief that the information he or she possesses evidences government misconduct that ought in the public interest to be disclosed. They will also require the Special Counsel to have such a belief before he or she permits further action to be taken in respect of the employee's allegation. In other words, the public interest will be paramount. We see no reason, then, to exclude a particular class of Crown employee from the statutory protection where such protection is premised on this overriding interest. Accordingly, we recommend that our proposals respecting whistleblowing should apply equally to all categories of Crown employees.

It bears mentioning here that an earlier Commission recommendation was that the common law duties of loyalty, good faith, and confidentiality, including the common law defences to actions brought for breach of these duties, should be retained, at least to the extent that the common law is consistent with the Commission's proposed disclosure rules. Lest it be thought that our recommendations for a Special Counsel procedure would preclude the operation of the common law whistleblowing defence, we wish to emphasize that such a defence would continue to be available to Crown employees.

The recommendation to retain the common law defence rests on the notion that the exigencies of the situation may not permit the use of the proposed Special Counsel procedure. In some cases, for example, an emergency may induce an employee to bypass the Special Counsel in order to release information that, in the employee's view, demands immediate disclosure in the public interest. We see no reason for automatically denying protection to an employee simply because he legitimately exposes serious government wrongdoing without first taking the matter to the Special Counsel, even where it would have been feasible for the employee to do so. Such denial would involve a reduction of the rights he now enjoys in this context.

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[162] See *supra*, note 137.

[163] *Supra*, note 136.

[164] Vaughn, *supra*, note 104, at 640.

However, because of the advantages we see in the Special Counsel procedure, we expect that this procedure will be used in all but exceptional cases. In this connection, reference should be made again to the general admonition of the common law to exhaust internal channels before releasing information about government wrongdoing. We believe that this is a salutary objective. Accordingly, it is anticipated that, where an employee does not resort to that procedure, but seeks to rely on the proposed common law defence for whistleblowing, the tribunal hearing the matter would take into account, among other things, the means used by the employee in exposing the government wrongdoing. That is to say, the tribunal would be entitled to determine whether, having regard to all the circumstances, the employee was justified in bypassing the Special Counsel procedure and disclosing the information on his or her own initiative.

Before setting out the more formal Special Counsel procedure, described briefly above, we wish to offer our proposal respecting the advisory role of the Special Counsel. Not infrequently, a conscientious employee may wish to seek authoritative advice concerning what he or she believes may be government wrongdoing. This advice may induce the employee to pursue the matter further, either by means of the proposed Special Counsel procedure or otherwise, or to let the matter rest. As we have said, and as we shall see below, the Special Counsel procedure envisaged by the Commission involves, among other things, an investigation of an employee's allegation, a report by the appropriate government agency head, the placement of the employee's information and the agency report in a public file, and, in some cases, an application to the court to determine whether confidential information may be disclosed to the public. However, the employee may not wish to embark on this more formal path, at least until he or she has obtained some advice or guidance relating to both the merits of the allegation and the various options open.

At present, there is no official to whom all Crown employees may go for advice concerning allegations of government misconduct. The Commission is of the view that the Special Counsel ought to perform this purely advisory function. The Special Counsel's views may well convince the employee that no government wrongdoing has taken place, thereby precluding unnecessary further proceedings. Or the Special Counsel may suggest relatively expeditious ways of alerting the proper officials to the existence of government misconduct, particularly where the misconduct is trivial or inadvertent. Alternatively, the Special Counsel may advise the employee that the latter's information does, in fact, raise serious concerns about gross government wrongdoing, as a result of which the employee may decide to pursue the matter.

Accordingly, the Commission recommends that a Crown employee should be entitled to seek the advice and guidance of the proposed Special Counsel where the employee has information that he or she believes evidences government wrongdoing. The Special Counsel should be under a duty to advise the employee concerning such matters as the options available to him or her should the employee wish to pursue the issue further. Since the relationship between the Special Counsel and the employee would be that of solicitor and client, the employee would be assured of confidentiality.

The Commission wishes to make it clear that the role envisaged by the preceding recommendation is not intended to involve investigative functions on the part of the Special Counsel. Prior to the institution of the formal procedure, the role of the Special Counsel is intended to be purely advisory.

We turn now to consider the main elements of the more formal Special Counsel procedure proposed by the Commission. First, attention should be directed to the government activities in respect of which an employee would be entitled to disclose either confidential or non-confidential government information to the Special Counsel and be protected from subsequent disciplinary measures.

In this connection, we have concluded that a Crown employee should be entitled to invoke the Special Counsel procedure in respect of the following activities:

(1) a violation of a statute, regulation,[165] or rule; or

(2) mismanagement, waste of funds, abuse of authority;[166] or

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[165] For a discussion of a broad meaning given to the term "regulation" under the American legislation, see Vaughn, *supra*, note 104, at 626-27. The author stated that Congress "sought to protect disclosures whenever an agency violated any established standard whether contained in statute, rule, or other form of agency statement". For greater certainty, we have decided to use the phrase "statute, regulation, or rule".

[166] Under the American Civil Service Reform Act, *supra*, note 136, the Special Counsel is empowered to prescribe regulations relating to his Office: 5 U.S.C. § 1206(k). These regulations define "gross waste of funds", "management", and "abuse of authority" as follows (5 C.F.R. § 1250.3(d), (e), and (f)):

> 1250.3. As used in this subchapter...
>
> (d) 'Gross waste of funds' means unnecessary expenditure of substantial sums of money, or a series of instances of unnecessary expenditures of smaller amounts.
>
> (e) 'Mismanagement' means wrongful or arbitrary and capricious actions that may have an adverse effect on the efficient accomplishment of the agency mission.
>
> (f) 'Abuse of authority' means an arbitrary or capricious exercise of power by a Federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons.

While we do not wish to incorporate a definition of "mismanagement", "waste of funds", and "abuse of authority" in the legislation that we propose, we do anticipate that these terms would comprehend the type of conduct to which § 1250.3(d), (e), and (f) of the regulations refers.

It should be noted that, in s. 27(b) of the OPSEU draft legislation, *supra*, note 44, as in the American legislation, the word "gross" appears, but modifies only "waste of

(3) danger to health or safety;[167] or

(4) other wrongdoing of a similar nature.

Insofar as the specificity of the wrongdoing is concerned, the Commission wishes to make one further proposal. We believe that the types of wrongdoing described above should be subject to a requirement that such wrongdoing "ought in the public interest to be disclosed". This provision would ensure that an allegation of government wrongdoing of, for example, a trivial nature would not give rise to the whistleblowing protection envisaged by our recommendations.

Finally, we wish to address the issue of the whistleblower's motivation or good faith. It may be suggested that an employee should be protected from disciplinary or other measures in every case where the information given to the Special Counsel concerning alleged government wrongdoing turns out to be correct, even though the employee did not have a reasonable belief in the accuracy of the allegation.[168] The Commission does not agree with this exclusively result-oriented approach. While we believe that an employee's actual motivation for whistleblowing should not be a factor,[169] statutory protection ought to be available only where the employee reasonably believes in

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funds". We do not wish to leave open the possible interpretation that there are *degrees* of wrongdoing affecting "waste of funds" but not affecting the other categories. The use of "gross" before only one type of wrongdoing may leave the impression that less than "gross" mismanagement, abuse of authority, or danger to health and safety could come within the four corners of the provision. The original House of Representatives version of the American legislation did not contain the word "gross" before "waste of funds". The Senate version added this term. Vaughn stated that, "[t]herefore, the term 'gross' establishes some threshold of magnitude" (*supra*, note 104, at 628). He did not consider, however, why this same degree of misconduct should not be required in respect of the other categories.

[167] It should be noted that the American legislation refers to a "substantial and specific danger to public health or safety". Vaughn noted that the "committee wished to remove from protection general criticism that an agency such as the Environmental Protection Agency was not doing enough to protect the environment" (*supra*, note 104, at 628). We do not believe that the term "specific" is necessary. Indeed, its inclusion may serve to exclude government wrongdoing that ought to be exposed. Our recommended provision should be adequate to deal with general or amorphous criticisms that do not contain sufficient concrete evidence of misconduct that should, in the public interest, be disclosed.

[168] Both the United States Civil Service Reform Act, *supra*, note 136, and the OPSEU draft legislation, *supra*, note 44, contain a "reasonable belief" requirement. With respect to the relevance of the accuracy of an employee's allegation of wrongdoing in unfair dismissal cases, see Cripps, *supra*, note 111, at 526-27.

[169] In the sense that the employee's reason for pursuing the matter — such as personal revenge against the employee's superior — should be irrelevant so long as "reasonable belief" exists. But subjective factors are not necessarily absent from the latter concept. See Vaughn, *supra*, note 104, at 626, discussing the Civil Service Reform Act, *supra*, note 136:

> The precise statutory language, 'reasonably believes', suggests that the Act may also include a good faith requirement. The 'belief' requirement focuses on actual

the accuracy of the allegations. To provide statutory protection to employees without such a belief may have the effect of encouraging disaffected employees to embarrass the government, without offering any inducement to obtain sufficient evidence concerning the alleged misconduct.[170] We believe that the possibility that some wrongdoing will remain undisclosed is a reasonable price to pay.

The Commission believes that the formulation, described above, concerning the nature of the wrongdoing that would justify invoking the statutory protection, and concerning the belief of the whistleblower in the existence of such wrongdoing, would effectively balance the public interest in exposing serious government wrongdoing and the government's interest in effective administration and non-disruptive behaviour by vexatious or vindictive Crown employees. Accordingly, the Commission recommends the enactment of a provision that would protect a Crown employee from any disciplinary action where he or she discloses to the Special Counsel government information that the employee reasonably believes evidences (1) a violation of a statute, regulation, or rule; (2) mismanagement, waste of funds, or abuse of authority; (3) danger to health or safety; or (4) other wrongdoing of a similar nature, by government or any agency, branch, division, or employee thereof, in the course of performing any public function or exercising any power conferred by law, that ought in the public interest to be disclosed.

We wish to emphasize that the protection to be afforded to an employee under this proposal is in respect of the employee's allegation of some kind of serious government wrongdoing. The protection is not intended to cover grievances concerning personnel or other matters, such as those relating to alleged sexual harassment, for which other remedial procedures already exist.

As we have seen, the requirement of reasonable belief, the focus on serious government wrongdoing, and the paramountcy of the "public interest" would operate to preclude the proposed whistleblowing protection for allegations of government wrongdoing of a trivial nature. As a further device by which such wrongdoing would be screened, the Commission recommends that the Special Counsel should not be entitled to initiate further proceedings, as proposed below, unless the Special Counsel reasonably believes that the information disclosed by the employee evidences government wrongdoing that

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belief and therefore contains a subjective component. Consequently, the requirement incorporates good faith principles. The legislative history supports this interpretation. The Senate Report [S. Rep. No. 969, 95 Cong., 2d Sess. 23 (1978)] emphasizes that an employee should not be protected for making a disclosure of information that the employee knows to be false. Given the ethical underpinnings of the arguments for whistleblower protection and the arguments against such protection, Congress could have been expected to impose such a good faith requirement.

[170] As a result, even the good faith of an employee whose belief was not "reasonable", in the objective sense, would not insulate him or her under our proposals. See Cripps, *supra*, note 111, at 526. The author recommended protection for an employee who disclosed confidential information "in good faith with a reasonable belief that the disclosure was in the public interest" (at 537).

ought, in the public interest, to be disclosed. The determination of the public interest would require an assessment of the relative weight to be given to the government's interest in confidentiality and the public's interest in the disclosure of information allegedly evidencing government wrongdoing. While, ordinarily, this balancing of competing interests would prove to be a difficult task, it should be borne in mind that our proposals require only a reasonable belief that disclosure would be in the public interest.[171]

While the Commission is of the view that it is essential to empower the Special Counsel to screen allegations of government wrongdoing before proceeding further with the matter, it has been suggested that the Special Counsel should be granted even broader discretionary powers exercisable during the course of such proceedings. This suggestion raises serious questions concerning the nature and role of the Office of Special Counsel.

One view would severely restrict the ambit of the Special Counsel's discretion, essentially making the Special Counsel a conduit, obtaining information from employees, requesting reports from relevant government agencies, making certain matters public in accordance with the legislation, and, at the employee's request, applying to the court for a determination of the status of information that the government agency seeks to keep confidential. The procedure to be followed by the Special Counsel, and the means by which information is to be released by him to the public, would be strictly regulated by statute. This type of scheme would, in a sense, be imbued with a kind of formalism, an important characteristic or by-product of which would be a substantial degree of predictability.

The type of scheme described above is the one essentially advocated by the Ontario Public Service Employees Union and, as will be apparent from the following discussion, the one to which we basically subscribe. It may be suggested, however, that this type of scheme would be unduly rigid and that the role of the Special Counsel would be unjustifiably passive. Arguably, the powers of the Special Counsel ought to be broadened to accord more with those conferred, for example, on the Ombudsman under the *Ombudsman Act*.[172] A brief review of the functions and powers of the Ombudsman should help to put in perspective the major differences between the two approaches.

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[171] The OPSEU draft legislation, *supra*, note 44, also gives to the Special Counsel a discretion exercisable immediately upon receipt of the employee's allegation of government wrongdoing. Section 29(1) requires the Special Counsel to initiate further proceedings in respect of the employee's allegation of misconduct only "if the public interest in disclosure is more than minimal".

The Commission's proposal differs from that offered by OPSEU. Under the OPSEU test, having regard to the use of the word "minimal", the Special Counsel arguably would be required to reject further procedures only where the employee's allegation was thought to have virtually no merit. Under the Commission's stricter test, the Special Counsel would be empowered to assess for himself or herself the seriousness of the alleged misconduct and the government's interest in non-disclosure, and to initiate further proceedings only where the proposed higher standard has been met. We believe that this test is justified, given that the proposed whistleblowing legislation should be regarded as a limited exception to the general disclosure rule, and that the consequences of the public exposure of alleged government wrongdoing may be quite serious.

[172] R.S.O. 1980, c. 325, as am. by S.O. 1984, c. 6.

Section 15(1) of the *Ombudsman Act* states that "[t]he function of the Ombudsman is to investigate any decision or recommendation made or any act done or omitted in the course of the administration of a governmental organization and affecting any person or body of persons in his or its personal capacity". Section 15(2) provides that "[t]he Ombudsman may make any such investigation on a complaint made to him by any person affected or by any member of the Assembly to whom a complaint is made by any person affected, or of his own motion".

The Act provides for cases where the Ombudsman is not empowered to act or where, in his discretion, he or she need not act. For example, the Ombudsman may refuse to investigate a complaint if, in his or her opinion,[173]

(a) the subject-matter of the complaint is trivial;

(b) the complaint is frivolous or vexatious or is not made in good faith; or

(c) the complainant has not a sufficient personal interest in the subject-matter of the complaint.

The Ombudsman is not empowered to proceed further where the decision, recommendation, act, or omission was that of "any person acting as a legal adviser to the Crown or acting as counsel to the Crown in relation to any proceedings".[174]

Once an investigation has been undertaken, the Ombudsman may "in his discretion refuse to investigate the matter further" if it appears "(a) that under the law or existing administrative practice there is an adequate remedy for the complainant, whether or not he has availed himself of it", or "(b) that, having regard to all the circumstances of the case, any further investigation is unnecessary".[175] The Ombudsman may also refuse to continue the investigation if any of the factors outlined in section 18(2) are found.[176]

Assuming that the Ombudsman decides to proceed with the investigation, he or she has considerable investigatory powers: section 20(2) gives the Ombudsman authority to examine government and other witnesses under oath, and, under section 26(1), the Ombudsman has the authority to enter "any premises occupied by any governmental organization ... and carry out therein any investigation within his jurisdiction". By section 28, any person who wrongfully frustrates the Ombudsman's investigation or "wilfully makes any false statement to or misleads or attempts to mislead the Ombudsman" is guilty of an offence and liable to punishment. Although the powers accorded the Ombudsman are qualified in the Act,[177] they are nonetheless substantial. In particular, reference should be made to section 22 of the Act, which empowers the Ombudsman to report his or her opinion and recommendations to the appropriate governmental organization, to request that organization to notify him or her of the steps, if any, it proposes to take to remedy the problem, and, if no appropriate or adequate action appears to be taken, to send a copy of the report and recommendations to the Premier.

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[173] *Ombudsman Act*, *ibid.*, s. 18(2).

[174] *Ibid.*, s. 15(4)(b).

[175] *Ibid.*, s. 18(1).

[176] See *supra*, text following note 173.

The Commission has come to the conclusion that the role and powers of the Special Counsel should not be the same as the role and powers of the Ombudsman. We believe that each has an important, but different, part to play in the government and public administration of Ontario, broadly conceived. It is our view that the proposed Office of Special Counsel should perform a specialized function, namely, to serve as a vehicle, a safe haven, for legitimate whistleblowers who wish to expose, or to seek advice and guidance concerning, serious government wrongdoing and be protected in so doing. The purpose of the Office is not to monitor government activity and ferret out government wrongdoing as an independent investigative agency.

The procedure that we believe ought to govern the Office would necessarily involve an opportunity for the appropriate government agency to respond to the employee's allegation and to rectify any misconduct. However, we believe that the creation of a large new bureaucratic entity with broad investigative and other powers similar to those exercised by the Ombudsman is neither necessary nor desirable. We see no reason for the creation of such an institution in order to accomplish the relatively narrow, but important, tasks assigned to the Special Counsel under our proposals.

In order that employees may repose utmost faith and confidence in the integrity and loyalty of the Special Counsel as their legal adviser, and in the confidentiality of their dealings with him or her, we have recommended that the Special Counsel's relationship to the employee should be that of solicitor and client.[178] To countenance any other type of relationship would be to undermine, at least potentially, that faith and confidence and, thereby, possibly discourage employees from utilizing the Special Counsel procedure in the first place.

The creation of a solicitor-client relationship has implications for the kinds of powers that ought to be given to the Special Counsel. A Special Counsel who combines a solicitor-client relationship with broad discretionary and investigatory powers would inevitably be compelled to balance the interests of government against the interests of employees. In so doing, he or she might be seen as having compromised at the outset the Special Counsel's unique position *vis-à-vis* his or her "clients". At the very least, employees might fear that the Special Counsel could be co-opted by government.

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[177] See, for example, ss. 20(3), 21(1), and 26(2) and (3).

[178] See *supra*, this ch., sec. 1.

However, while we would reject the notion that the Special Counsel should have broad investigative or adjudicative functions, we do acknowledge that there may well be occasions where some discretionary powers in the Special Counsel would not be unwarranted. The nature and extent of these discretionary powers will become apparent in the following discussion.

We start at the point where the Special Counsel reasonably believes that the employee's information does, in fact, evidence government wrongdoing that ought, in the public interest, to be disclosed. The Commission is of the view and, accordingly, recommends that, as a general principle, the Special Counsel should then be under a duty to require the head of the appropriate agency to investigate the employee's allegation and, within thirty days, submit to the Special Counsel a report describing, *inter alia*, the conduct of the investigation, whether any wrongdoing was discovered, and what the head has done or intends to do as a result of the investigation.[179] As we indicated earlier, this procedure would provide an agency with the opportunity to respond to the employee's allegation before any disclosure may be made to the public. The effect on government and public administration would, we believe, be a salutary one, particularly where the wrongdoing was inadvertent or trivial.[180]

However, we do wish to express our concern about the situation where the head of the agency that must investigate and report is or may be involved in some way in the alleged wrongdoing. Where the employee's allegations are true, the procedure outlined above may serve only to alert the head to potential trouble. In some cases, the head may seek to cover up the misconduct, falsifying or destroying valuable evidence in the process. Even where the head is not directly involved in the actual wrongdoing, allegations of criminality or fraud on the part of subordinates over whom the head has direct or indirect control may compel the head to attempt to forestall or frustrate any further proceedings by the Special Counsel or others.

In the types of case described above, we believe that it would not be appropriate or realistic for the Special Counsel to seek the cooperation of the head of the government agency involved. In order to ensure the proper resolution of the matter, and to ensure that the employee's allegation of wrongdoing is dealt with in a satisfactory manner, we recommend an exception to the general rule outlined above concerning the requirement that a report be made to the Special Counsel by the appropriate agency head. Where the Special Counsel reasonably believes that it would not be desirable to require the head of the appropriate agency to investigate the employee's allegation and report back to him or her, because, in the Special Counsel's view, a proper investigation and report would not take place or would not result in a proper resolution of the issue, the Special Counsel should be empowered to disclose the relevant information to whatever person or body the Special Counsel thinks appropriate.

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[179] See OPSEU draft legislation, *supra*, note 44, s. 29.

[180] Vaughn, *supra*, note 104, at 664, noted, with reference to the United States Civil Service Reform Act, *supra*, note 136:

> A recent survey of the attitudes of federal employees shows that the major deterrent to an employee's willingness to report fraud and waste is not fear of reprisal but the belief that nothing will be done. Therefore, the most important part of the whistleblower provision may be that which requires that agencies respond in certain circumstances to employees' allegations of wrongdoing.

Vaughn continued, as follows (at 665-66):

> This reporting requirement, one of the most controversial parts of the whistleblower provision, addresses the concern that nothing will happen as a result of an employee's whistleblowing. Moreover, it tends to keep complaints within the government channels because it allows a whistleblower to seek correction of agency misconduct while reducing his personal risks. Because the provision places a considerable burden upon agency officials, it should prompt agencies to make credible internal procedures directed to the same end.

In many of these cases, we anticipate that the release of information would be to the police. But serious breaches of, for example, statutory provisions may well be of more immediate interest to the Ombudsman or the Ministry that administers such provisions. The Commission believes that the proper recipient of the information from the Special Counsel cannot be specified in advance, since different types of misconduct may dictate different responses. We do, however, wish to stress our view that the proposed power of the Special Counsel to circumvent the normal internal reporting procedure, proposed earlier, should be an exception to the general rule, exercisable only where it is reasonably believed that it would be counterproductive to proceed otherwise.

In requiring, as a general rule, that the appropriate agency head report to the Special Counsel, and in proposing but one exception to this rule, the Commission has necessarily rejected, in the context of the formal Special Counsel procedure, the view that the Special Counsel should be entitled to require the employee to request an investigation by the head.[181]

The difficulty that may well arise if an employee is *required* to communicate his or her concerns directly to the agency head seems clear. An employee seeking anonymity and cover for his or her exposure of agency wrongdoing may not welcome instructions to take the matter up with the head of the very agency at whom the employee's finger is pointing. If the head is, in fact, involved in the misconduct, either directly or indirectly — and this may not be known to the Special Counsel or the employee — knowledge of the employee's allegation would serve to alert the head to potential trouble and to jeopardize the employee's position. Even if the head is not involved, the reaction to a whistleblowing employee may be less than enthusiastic. In short, the very purpose of creating the Office of Special Counsel could easily be frustrated by permitting the latter to require employees to do directly what they have, in fact, justifiably sought to do indirectly by means of the Special Counsel procedure.

As we have proposed, where the Special Counsel determines that the head of the appropriate agency head should investigate and report, he or she would be required to submit the report to the Special Counsel within thirty days. However, there may be cases in which the Special Counsel believes that the normal thirty day period is too long. The employee's allegation may involve what the Special Counsel considers to be a matter of urgency. In such a case, we recommend that the Special Counsel should be empowered to require the appropriate head to investigate and report, either orally or in writing, at the earliest reasonable opportunity.[182]

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[181] However, we have recommended earlier that, where an employee comes to the Special Counsel only for advice, and where it is thought to be appropriate, the Special Counsel may suggest that the employee should report his or her concerns to the employee's superior or other proper authority.

The Commission is of the view that, as a general principle, the proposed whistleblowing legislation will be of minimal utility unless public disclosure is its ultimate goal and accomplishment. Legitimate whistleblowing necessarily demands the public exposure of serious government wrongdoing in order not only that corrective action may be taken, but also that further misconduct may be deterred. As we have said, public scrutiny of government conduct is an essential feature of a democratic society.

Bearing in mind, then, this general principle, the Commission recommends that the Special Counsel should be required to maintain a special file containing the information disclosed to him or her by the whistleblowing employee and any report submitted by the agency head.[183] Subject to one exception, discussed below, the file should be open to the public after the Special Counsel receives the agency head's report or after the expiry of the period during which the report must be filed. In the latter situation, the file would, of course, contain the employee's information alone. In no case, however, should the file that is open to the public contain the name or any other identifying feature of the whistleblowing employee that would jeopardize the employee's anonymity.

We turn now to a consideration of whether the general rule, proposed above, ought to be subject to any exceptions. For example, we can envisage a report by the agency head that contains compelling evidence that the employee's allegation is false or seriously misleading. Or the employee, after seeing the agency report, may come to the view that the matter ought not to be pursued any further. Should the employee have the right to preclude publication of the information, or should the Special Counsel alone be empowered to determine whether access to the file should be refused to the public?

Against the right of an employee to exercise control over events and, therefore, to deny public access to the file, it may be argued that the public ought to be apprised of serious wrongdoing, especially if confirmed in the agency report, irrespective of the employee's wishes. Having initiated the procedure and placed the matter before the Special Counsel and, as a necessary consequence, the government agency as well, arguably the public interest should take precedence over the wishes of the individual employee.

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[182] In some instances, alerting the head may activate s. 11 of the proposed *Freedom of Information and Protection of Individual Privacy Act, 1986*, *supra*, note 2, which reads:

> 11. Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public.

[183] See OPSEU draft legislation, *supra*, note 44, s. 30.

In favour of granting the employee such a right, it may be argued that, if employees are unable to control events, they may hesitate to use the Special Counsel procedure. Where, for example, it appears from the agency report that the wrongdoing in question has been rectified, the employee may prefer, in the interests of his or her future relationships within the agency, to forgo publication, especially where such publication would result in a loss of anonymity.

There is, however, a price to be paid if ultimate control of the procedure is to reside exclusively in the whistleblower. The fear that a lack of ultimate control would discourage the use of the Special Counsel procedure must be weighed against the public interest in disclosure and the possibility that the power to deny public access to the Special Counsel's file may put a different kind of pressure on the employee. Under these circumstances, there is the potential that an employee may be "bought off" by those responsible for the wrongdoing.

The Commission has concluded that neither mandatory disclosure by the Special Counsel nor ultimate control by the whistleblower is entirely satisfactory. We believe that a compromise approach would best balance the employee's need to retain some degree of control over the proceedings, in order, for example, to preserve his or her anonymity, with the public's interest in knowing of serious government wrongdoing. Accordingly, the Commission recommends that, after receipt of the agency report or after the expiry of the period during which the report must be filed, the Special Counsel should be entitled to refuse to grant public access to the file described earlier where he reasonably believes that the employee's information and any agency report do not, in fact, evidence government wrongdoing that ought, in the public interest, to be disclosed.[184] In making this determination concerning the public interest, the Special Counsel should be required to have regard to all the circumstances of the case, including whether the employee's anonymity would be jeopardized by disclosure. Where, then, an employee believes that the agency report has satisfied his or her original concerns — for example, the report may indicate that the problem has already been dealt with — or where, for any other reason, such as a concern for anonymity, the employee does not wish to see his or her information and the agency report made public, the employee would be entitled to make representations to the Special Counsel that the latter exercise his or her discretion to deny access to the file.

In offering our recommendations concerning the Special Counsel's maintenance of a public file and his or her power to deny access to it where such action is warranted in the public interest, no distinction has been made between wrongdoing in respect of which the agency, in its report, indicates that corrective action *will* be taken, and wrongdoing that the agency states has *already* been remedied. We believe, as a general principle, that the public's right to know of government wrongdoing does not terminate simply because the wrongdoing was in the past and has been satisfactorily remedied. In either case, public exposure may be salutary; it may, for example, serve as a deterrent to further misconduct. We leave to the Special Counsel the decision whether it is in the public interest for particular past, but corrected, wrongdoing to be disclosed.

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[184] See *ibid.*, s. 30(a), which provides that the public may be denied access to the Special Counsel's file where, "in the opinion of the Special Counsel, the public interest in obtaining access to the file is minimal".

Where the Special Counsel has forwarded the employee's information to a person or body other than the agency head, as proposed earlier, a question arises concerning what further action the Special Counsel should be required or empowered to take. The Commission is of the view that the mere fact that the Special Counsel has not sought a report of the agency head should not alter the general principle concerning the placement of information in the proposed public file. However, in some instances, the recipient of the employee's information will be the police or some other body, which may then commence an investigation of that information and the alleged wrongdoing. We are concerned that the conduct of any such examination not be jeopardized or frustrated by a premature release of information to the public in the Special Counsel's file.

While our general proposal giving discretion to the Special Counsel to deny public access to the file may well be sufficient to deal with the situation, we believe that the Special Counsel's jurisdiction in this narrower context should be made explicit. Accordingly, the Commission recommends that, in the circumstances described above, the Special Counsel should be empowered either to refuse to make any information available to the public in the Special Counsel's file, or to delay such publication, where he or she reasonably believes that disclosure would prejudicially affect any criminal or other investigation undertaken by the police or other body to which the employee's information has been sent.[185]

Under the foregoing recommendations, disclosure would ordinarily be accomplished by placing the employee's information and any agency report in a file to which the public has access. There may be circumstances, however, where the information sought to be disclosed is of such a nature that it ought to receive wider public exposure.

Accordingly, we recommend that, where the Special Counsel reasonably believes that the information is of immediate and significant interest to the public, the Special Counsel should be entitled to disclose the information to any person or body, including the police or the media, as he or she deems appropriate in all the circumstances.[186]

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[185] It should be noted that s. 14(1) of the proposed *Freedom of Information and Protection of Individual Privacy Act, 1986*, *supra*, note 2, provides that a head may refuse to disclose a record where the disclosure could reasonably be expected to, for example, "interfere with a law enforcement matter" (s. 14(1)(a)), "interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result" (s. 14(1)(b)), or "interfere with the gathering of or reveal intelligence information respecting organizations or persons" (s. 14(1)(g)). Indeed, a head "may refuse to confirm or deny the existence" of such records (s. 14(3)).

With respect to the question whether the employee should be given the right to preclude any such disclosure, consistent with the views expressed previously we do not believe that any exception should be made here to allow an employee to have the right to preclude disclosure or to designate the person or body to whom disclosure should be made. These rights properly belong to the Special Counsel, who may be presumed to be more likely to have the larger public interest in mind.

The previous discussion has dealt with information to which the public has been given a right of access under the proposed *Freedom of Information and Protection of Individual Privacy Act, 1986.* We now turn to a consideration of the release of confidential information, that is, information that an agency head may, or must, refuse to disclose. This type of information appears in sections 12-22 of the Act as exceptions to section 10, the general access provision.

In determining how the proposed new Special Counsel procedure ought to deal with the disclosure of confidential information, we shall consider first the case of confidential information disclosed by an employee to the Special Counsel. We shall then turn to the case where the agency head, required to report to the Special Counsel, determines that the agency has relevant information that is confidential. However, we should begin by setting forth the Commission's general recommendation, namely, that a separate set of rules should be enacted to govern the disclosure of confidential employee or agency information in the context of whistleblowing.

With respect to information disclosed to the Special Counsel by the employee, we recommend that, where the appropriate agency head has been notified of the employee's allegation by the Special Counsel, the head should be under a duty to inform the Special Counsel, forthwith and in writing, of any determination that he or she makes that such information is confidential and should not be disclosed to the public. In such a case, the employee should have two options. First, he or she should be entitled to require the Special Counsel to apply to the court for an order that the confidential information, originally disclosed to the Special Counsel, should now be disclosed to the public.

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[186] See s. 31 of the OPSEU draft legislation, *supra*, note 44, which provides as follows:

> 31.-(1) Where an employee discloses information to the Special Counsel that the Special Counsel believes is of immediate and significant interest to the public, the Special Counsel shall, after receiving the agency report, or after the lapse of the period during which an agency may file a report under Section 29, or after such further period as may be agreed to by the employee, disclose the information to the press and other media of communication, unless otherwise instructed by the employee.
>
> (2) Where an agency report under Section 29 discloses information to the Special Counsel that the Special Counsel believes is of immediate and significant interest to the public, the Special Counsel shall, subject to Section 32(2)(b) forthwith disclose such information to the press and other media of communication, unless otherwise instructed by the employee.

The Commission is of the opinion that the power to release the information to the media alone is too restrictive. In some cases, the public would arguably be better served by the release of the information to the police, a member of Parliament or of the Ontario Legislature, or some other person or body.

Secondly, the employee should be entitled to disclose the information to the public on his or her own initiative, relying on the common law defence. In so doing, the employee would act at his or her peril, without the right to shield behind the Office of Special Counsel.[187] Lest it be thought that this would have a chilling effect on whistleblowers, it must be emphasized that we are dealing here with confidential information that an agency head, acting on proper statutory authority, has said must not be released, and that the employee always has the option to seek a court order for public disclosure. The Commission will recommend below that the costs of applications to the court by the Special Counsel should be borne by the Province. Therefore, inasmuch as it is not the employee who must apply to the court, or pay the attendant costs, we believe that the option of obtaining a court order would be a highly attractive one.

Turning now to the disclosure of confidential information held by the agency head, we recommend that, where the head properly determines, within the proposed freedom of information legislation, that the agency has relevant information that is confidential and ought not to be disclosed to the Special Counsel, the head should have the right to refuse to include this information in the report to the Special Counsel.[188] Where the employee wishes to pursue the matter, he or she should be entitled to instruct the Special Counsel to apply to the court for an order that the information be disclosed in the agency report and, therefore, ultimately to the public.[189]

In some circumstances, however, the information held by the agency head may be confidential, but he or she may decide that its release to the Special Counsel and the employee alone would serve to resolve the matter without jeopardizing the government's, and the public's, interest in keeping sensitive information confidential. Accordingly, the Commission further recommends that, where the confidential information may be released by the head under the proposed freedom of information legislation, the head should have the right to disclose the information to the Special Counsel and to the employee,[190] and to preclude any subsequent disclosure of the information by them. For example, under the circumstances envisaged here, the head would presumably wish to prohibit the information from appearing in the Special Counsel's public file, proposed earlier.[191]

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[187] It should be noted that this proposal differs from s. 33(a) of the OPSEU draft legislation, *supra*, note 44, which would permit the employee to require the Special Counsel to release the information to the public.

The Commission has grave reservations concerning OPSEU s. 33(a), that is, concerning any public disclosure, even where serious government wrongdoing is involved, in a situation where an agency head has properly determined that certain employee information must not or should not be disclosed, and in the absence of a court order authorizing its release. The consequences of disclosure may go considerably beyond the concerns of the employee; disclosure may result in the release of highly confidential information, where the release could not be justified even on the basis of the truth of the employee's allegations. While a court may be sensitive to all the circumstances of the case, and may be able to balance satisfactorily the competing interests, we are less sanguine when it comes to the employee or even the Special Counsel, however capable or conscientious. In an important sense then, under these circumstances we believe that the public's interest in non-disclosure, as determined by the agency head in accordance with his statutory jurisdiction, outweighs the employee's and public's interest in disclosure.

[188] See OPSEU draft legislation, *supra*, note 44, s. 32(2)(a).

[189] See *ibid.*, s. 34.

In some cases, the agency head may be faced with a substantial dilemma. To refuse to disclose the confidential information in the report may only serve to raise further the suspicions of the Special Counsel and the employee, without helping to resolve the matter; but to exercise the second option, by releasing the information to the Special Counsel and the employee, may run the risk of having the information disseminated even further, either intentionally or inadvertently. The information may be highly sensitive, and the agency head justifiably may not wish the employee to see it.

The Commission, therefore, recommends that the agency head should have a further option in the circumstances just described. The head should be empowered to disclose the information to the Special Counsel and to direct that there should be no further release to any other person. The purpose of this third option is to provide a means by which the Special Counsel is alerted to highly confidential information that would resolve, or help to resolve, the matter, but that ought not, in the public interest, to be disclosed to the employee or anyone else. Should the Special Counsel be convinced that the matter is being, or has been, properly taken care of by the agency, his unique status would be such that, ordinarily, he or she could then convince the employee that no further action is warranted.

We are mindful, of course, that the employee would be obliged to put his or her faith in the truth or accuracy of the agency's information and in the good judgment of the Special Counsel. Where the employee does not do so and, indeed, in any case where confidential information is withheld from the employee, we recommend that the employee should be entitled to instruct the

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[190] See *ibid.*, s. 32(2)(b).

[191] If the head did not so wish, he or she simply could have disclosed the information in the report to the Special Counsel, which would have been made public in due course.

No special prohibition on disclosure would be necessary in respect of the employee to whom the agency head has given the information. The employee would be subject to the general disclosure rule recommended earlier in this chapter: see *supra*, this ch., sec. 7(d)(ii). This rule would preclude a subordinate Crown employee from disclosing confidential information without prior authorization from the head. However, the employee would have the right to require the Special Counsel to apply to the court for an order that the information should be disclosed to the public.

Special Counsel to apply to the court for an order that the information should be disclosed to the public.

In recommending the enactment of a provision that would prevent an employee from seeing certain confidential information, we specified that the decision belonged to the agency head, not the Special Counsel. We did so, in part, for the reasons advanced earlier when considering the generally restricted nature and scope of the discretionary powers to be given to the Special Counsel. We are also firmly of the view that, subject to any court order, the determination whether the information in question is confidential, and what the disposition of that information should be, ought to reside in the agency head alone, as contemplated under the proposed freedom of information legislation.

With respect to the major substantive issues concerning whistleblowing, two further matters remain, the first concerning the adjudicative body to which the Special Counsel should apply for an order releasing otherwise confidential government information, and the second concerning the powers of that body.

The first matter, in respect of which a proposal has already been implicitly made in the context of our previous whistleblowing recommendations, relates to the forum that ought to determine whether confidential information should be disclosed to the public. In this connection, we recommend that the proper forum should be the court, rather than some other official or body.[192] The Commission is of the view that it is the courts that are called upon regularly to consider the kinds of issue that would be raised in respect of such information. The courts are best able to assess the public interest by balancing the need for public access against the need for confidentiality, having regard, for example, to the *Canadian Charter of Rights and Freedoms*.[193]

We do not believe that this assessment ought to be undertaken by, for example, the Information and Privacy Commissioner to be appointed under section 4(1) of the proposed *Freedom of Information and Protection of Individual Privacy Act, 1986*, at least as that official is conceived of under the present draft of the legislation. The Commissioner's functions and powers under the Act are quite different and, indeed, are relatively circumscribed.[194] To empower such a Commissioner to ascertain and balance the competing interests of the employee and the government, and then to determine what constitutes the larger public interest, in the sense contemplated by our proposals, would be to alter significantly the clearly defined role assigned to the Commissioner under the Act.

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[192] The OPSEU draft legislation, *supra*, note 44, provides for applications to the court.

[193] *Supra*, note 1. See *supra*, ch. 3, sec. 4.

[194] It should be noted, for example, that while s. 46(1) of the Act provides for a right of appeal to the Commissioner from a decision of a head, the provision also states that "the exercise of the discretion of a head to disclose or refuse to disclose a record which is found to be included under an exemption in section 13, 14, 15, 16, 17, 18, 19, 20, or 22 is not appealable".

Accordingly, we recommend that applications by the Special Counsel for an order that confidential information be disclosed to the public should be heard by the Supreme Court of Ontario. However, should the role and powers of the proposed Information and Privacy Commissioner be altered, so that the Commissioner is given jurisdiction to exercise wider discretionary powers and to order the disclosure of information in the "public interest", consideration should be given to empowering that official to hear applications by the Special Counsel.

The Commission further recommends that an appeal from the court's decision respecting the disclosure of confidential information to the public should lie to the Divisional Court. A further right of appeal to the Court of Appeal should be granted in any case that raises a question of public importance.[195]

In order to ensure ready access to the courts by employees, the costs of applications and appeals by the Special Counsel should be borne by the Province of Ontario. Clearly, no disciplinary action should be permitted to be taken in respect of anything done pursuant to the court order.

The question of the powers of the court on an application by the Special Counsel requires some elaboration. Accordingly, we recommend that, where the Special Counsel has brought an application to the court for an order for disclosure, the court should be empowered to order the Special Counsel to disclose the information in the appropriate manner where it considers that the public interest in disclosure outweighs the governmental interest in keeping the information confidential.[196] The court should be empowered to examine or hear the information *in camera* or otherwise, to order disclosure of all or part of the information, and to impose any restrictions or conditions that it thinks appropriate in the public interest.

In some cases, it may not be sufficient for the court simply to examine or hear the information in question. In order for the court to determine whether the public interest in disclosure outweighs the governmental interest in confidentiality, it may be necessary to hear testimony from the employee, who would not be a party to the proceedings. For example, it may be alleged by the government that the employee has fabricated the document in question or has lied to the Special Counsel. Since there can be no public interest in disclosing false information, the truth of the employee's allegation, and the information that purportedly supports it, may necessarily be put in issue. As a result, it may be essential to question the employee under oath.

The Commission is of the view that, as a general principle and to the greatest extent possible, the anonymity of those who invoke the Special Counsel procedure ought to be preserved; the proposed express statutory protections against disciplinary action may not be sufficient to assuage the legitimate apprehensions of Crown employees who are potential whistleblowers. However, in order to ensure the proper resolution of the dispute between the employee and the government, we recommend that the court should be empowered to order that the employee testify as a witness where the court is satisfied that the need for such testimony outweighs the employee's need to preserve his or her anonymity.

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[195] See OPSEU draft legislation, *supra*, note 44, s. 40.

[196] With respect to the nature and scope of the existing "public interest" whistleblowing defence at common law, see *supra*, ch. 3, sec. 2(b)(iii)c.

Under our proposals, the court would be able to fashion its disclosure order to fit the circumstances of each case. As a concomitant to these proposals, we further recommend that, once the Special Counsel has applied to the court, the Special Counsel should not be granted any discretionary powers in respect of the disclosure or non-disclosure of the information in question, unless expressly ordered by the court.[197] Moreover, at this stage the Special Counsel should not be empowered to discontinue or withdraw the application, whether on the employee's instructions or on his or her own initiative.

(f) SANCTIONS

The final matter to which we wish to refer concerns sanctions. We shall first deal with the effect of existing federal criminal sanctions on the type of disclosure regime proposed by the Commission in this Report. We shall then consider sanctions that may be invoked against an employee for breach of the general disclosure rule, proposed earlier, or for breach of the common law duties of loyalty, good faith, or confidentiality.

Earlier in this Report, the Commission examined the effect of both the

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[197] Under the OPSEU draft legislation, *supra*, note 44, ss. 33(b), 34, and 35, the application to the court is for an order that information be disclosed "in accordance with Sections 30 and 31". Of the two sections just mentioned, the reference to s. 30 is the more problematical. Section 30 requires the Special Counsel to make the special file available to the public unless, in his or her opinion, "the public interest in obtaining access to the file is minimal" (s. 30(a)) or the employee instructs the Special Counsel "not to make the file available to the public" (s. 30(b)). Does the OPSEU legislation envisage, for example, that the court would accede to the Special Counsel's application and then remit the matter to the Special Counsel, allowing him or her to exercise the discretion envisaged by s. 30(a)? Why would the court itself not determine the issue in its entirety?

Under OPSEU s. 36, "the Court shall order disclosure of the information where it considers that the public interest in obtaining disclosure outweighs the governmental interest in keeping the information confidential". Under OPSEU s. 41(1), the court is given very broad powers: on an application "the Court shall examine or hear the information, and may order disclosure of all or part of the information, and may impose any restrictions or conditions that it deems appropriate in the public interest". Is there, or should there be, any room for a further discretion in the Special Counsel to refuse to grant the public access to the file on the basis that its interest in obtaining access is minimal?

We think not. We believe that there ought not to be two decision-makers in respect of the same issue once the matter has been heard in court. As we have said, the court is the proper body to hear the applications in question.

Official Secrets Act,[198] which provides that the unauthorized communication of government information is a criminal offence, and section 111 of the *Criminal Code*,[199] which creates an offence for fraud or a breach of trust by an "official". Our general concern here is that these federal statutes might be interpreted in such a way as to criminalize certain disclosures of government information that, under the Commission's proposed rules, would be lawful, either under provincial legislation or at common law.

For the most part, this concern may be unwarranted, at least in respect of disclosure in accordance with provincial legislation that we propose. For example, disclosure of information to the Special Counsel would seem to involve little risk of criminal liability. It is doubtful whether such a disclosure would be a "breach of trust" within the meaning of section 111 of the *Criminal Code*. The offence under section 4(1)(a) of the *Official Secrets Act* is in respect of the communication of information to "any person other than a person to whom he is authorized to communicate with, or a person to whom it is in the interest of the state his duty to communicate it". Under the whistleblowing regime that we propose, the employee would, of course, be authorized to communicate with the Special Counsel. The same may also be said of disclosure by subordinate employees under the Commission's general rule: they, too, must be authorized by the proper agency head if they wish to disclose government information.

More problematic is the disclosure of information alleging government wrongdoing to someone other than the Special Counsel, for which, as we have seen, the common law public interest defence may be available. Would disclosure risk prosecution under section 111 of the *Criminal Code* as a breach of trust? Since, on one theory, a successful invocation of the common law whistleblowing defence is premised on the notion that no breach of trust has occurred, it is arguable that no breach of trust would have occurred under section 111. On the other hand, others have argued that the unauthorized disclosure of confidential information always and necessarily involves such a breach, although it may be *excused* in a subsequent civil action. One might, of course, wish to rely on the discretion of the Crown not to prosecute in such cases. However, the risk of prosecution, if it were known, might well discourage legitimate whistleblowing.

Similar questions concerning the effect of disclosure to a person other than the Special Counsel arise in connection with the *Official Secrets Act*, under which an offender is liable to imprisonment for a maximum period of fourteen years. In Canada, as in England, the consent of the Attorney General is a prerequisite to the initiation of prosecutions under the Act. The jurisprudence under the English Act suggests that the motive of the person who discloses information is irrelevant; in theory, this would preclude a public interest defence to a criminal charge under that Act.[200]

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[198] *Supra*, note 108. See *supra*, ch. 3, sec. 3(b)(ii)b.

[199] *Supra*, note 109. See *supra*, ch. 3, sec. 3(b)(ii)a.

Under our whistleblowing proposals, and indeed under the present law, a Crown employee who makes an unauthorized disclosure would be entitled to invoke a public interest defence in a discipline proceeding or in a breach of confidence action, a defence that he or she would not have to a charge under the *Official Secrets Act* and, possibly, under the *Criminal Code*. This might appear to be anomalous, insofar as it is generally more difficult to obtain a criminal conviction than to succeed in a civil action.

The preceding discussion has focused on the consequences, insofar as the criminal law is concerned, of a *lawful* disclosure of government information by a provincial Crown employee. But, as we have said, we are also concerned with the potential effect of the *Official Secrets Act* and section 111 of the *Criminal Code* on the release of information that, under our proposals, would be *unlawful*.

With respect to the two matters raised above, it should be noted that the *Official Secrets Act* has been the subject of intermittent study in both Canada and England. These studies have criticized the breadth of the legislation and have recommended sweeping changes in its coverage.

In Canada, the McDonald Commission[201] concluded that it was inappropriate to include offences concerning the unauthorized disclosure of government information in a statute dealing with espionage. Accordingly, it recommended that such disclosure should be addressed by separate legislation. Moreover, it stated that criminal liability should not be imposed for all types of unauthorized disclosure. The McDonald Commission proposed that the release of information relating to "security and intelligence" and to the "administration of criminal justice" ought to be comprehended by new criminal legislation. Having regard to its limited terms of reference, the McDonald Commission did not deal with with criminal liability for the disclosure of all other types of government information, although, as we have seen, it would not impose criminal liability in all such cases. Moreover, it proposed, as a defence to a charge of unauthorized disclosure of information relating to the administration of criminal justice, what is in essence a whistleblowing defence. It recommended that "it should be a defence to such a charge if the accused establishes that he believed, and had reasonable grounds for believing the disclosure of such information was for the public benefit".[202]

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[200] See *supra*, ch. 4, sec. 3(b)(i). But see *R. v. Ponting*, unreported (January 28-February 11, 1985, Central Criminal Court), discussed *supra*, ch. 4, sec. 3(b)(i).

[201] Canada, Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *First Report: Security and Information* (1979). See *supra*, ch. 4, sec. 2(b)(i)d.

[202] *Ibid.*, at 25.

In England, the Franks Committee[203] studied the role of the criminal law in protecting official government information. Like the McDonald Commission, the Franks Committee distinguished espionage from the leakage of other government information, and recommended that provisions dealing with the latter type of conduct should appear in new legislation. And, like the McDonald Commission, it also concluded that not all unlawful disclosure should be criminalized, a view expressed later in a White Paper[204] presented to Parliament, although the White Paper differed as to the classes of information that ought to be protected by the criminal law.

It is not intended to review the proposals of the three bodies referred to in the preceding paragraphs. Suffice it to note that each recommended dramatic changes to the applicable *Official Secrets Act*, changes that would decriminalize the disclosure of government information under many circumstances now covered by the legislation.

With respect to the effect of existing federal criminal sanctions on our proposed disclosure rules, the Commission is firmly of the view that the integrity of these rules, including the common law whistleblowing defence that we would retain, should be preserved in the face of possibly antagonistic federal legislation. We would not wish to see a Crown employee absolved from civil liability or protected from disciplinary action, only to be met with criminal sanctions for the same conduct. Accordingly, we recommend that, if necessary, Parliament should amend any relevant federal legislation in order to ensure that the disclosure of government information that, under our proposals, would be *lawful*, either under provincial legislation or at common law, is not subject to criminal sanctions.

The Commission further recommends, that, bearing in mind the proposals made in the reports described above, the federal government should study the disclosure regime proposed by us in order to determine what criminal sanctions, if any, ought to be imposed for the disclosure of government information that, under our regime, would be *unlawful*, either under provincial legislation or at common law. While we have not engaged in any critical study of the subject of criminal liability for the unlawful disclosure of government information, we do wish to emphasize the general conclusions of the several bodies in Canada and the United Kingdom in favour of drastic decriminalization.

By and large, acceptance of these conclusions would leave the consequences of the unlawful release of government information to the Province. As we have seen, the proposed freedom of information legislation does provide for sanctions, although only in a relatively narrow context; the legislation also contemplates a review of the various statutory non-disclosure provisions in order to repeal unnecessary or inconsistent provisions and to amend those that do not conform to the purposes of the Act.[205] In addition, the government, as an employer, has at its disposal a whole range of disciplinary measures that are available to any employer under general employment law. We wish to make it clear that the Commission's recommendations concerning the disclosure of government information and the retention of the common law duties and defences are not intended to affect in any way these aspects of the law relating to employment sanctions. We believe that this law, including the normal grievance procedures, should remain operative and should continue to deal with the various kinds and degrees of employee misconduct, from good faith inadvertent breaches to flagrant violation of the proposed disclosure rules.

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[203] United Kingdom, Departmental Committee on Section 2 of the Official Secrets Act 1911, *Report of the Committee* (Cmnd. 5104, 1972). See *supra*, ch. 4, sec. 3(b)(iii)a.

[204] United Kingdom, *Reform of Section 2 of the Official Secrets Act 1911* (Cmnd. 7285, 1978). See *supra*, ch. 4, sec. 3(b)(iii)b.

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[205] See *supra*, this ch., sec. 7(c).

MEMORANDUM OF RESERVATIONS BY THE HON. RICHARD A. BELL, PC, QC, LLD

I have signed this Report with some genuine doubts, or as lawyers say, *dubitante*. I wish to have extended to all public servants the greatest measure of political freedom, *consistent* with the maintenance of what we now generally have, an independent, neutral public service based upon the merit system. I am proud of the present quality we have achieved at both federal and provincial levels across Canada and, *as a first principle*, seek to assure the full maintenance of such quality, independence and absence of political preferment, *an approach shared fully by all my colleagues*, as the Report makes evident.

My doubts arise from personal experiences much earlier in my life. When I had, in the 1940's, experience as the first national director of a Canadian political party, I discovered, in certain Maritime Provinces, that the organization "machines" of the government party were based upon road superintendents in each County, persons on the public payroll whose knowledge of political organization far exceeded their knowledge of road building. Nor apparently was that a new thing. Waite's splendid recent biography of Sir John Thompson makes it clear that the Prime Minister's "machine" in Antigonish, N.S. in the 1880's and 1890's was based upon the postmasters and the station masters of the government owned railway. Then, in at least one Prairie Province, I found that the organization of the government party was based upon persons on the public payroll, namely: *Prairie Farm Rehabilitation Act* and *Prairie Farm Assistance Act* inspectors who went from farm to farm, preaching the Party gospel while dispensing largesse. The possible return to such conditions is utterly abhorrent to me. But all these public servants who, in earlier days, were the "core" of "political machines" would be in the non-restricted categories proposed by this Report, and able, legally and without hindrance, again to be the key persons in the formation of such "political machines".

Some of my doubts arise also from my personal distasteful experience with the patronage system during my early years as a Member of Parliament. When I was first elected to Parliament in 1957, patronage was in full effect for appointments to the House of Commons staff (protective staff, messengers, charpersons) to the trades personnel in Public Works (carpenters, plumbers, electricians, labourers, etc.) and to the summer employees of the Central Experimental Farm. Notwithstanding the institution of the merit system in the *Civil Service Act* of 1918, a landmark measure sponsored by Sir Robert Borden, these areas of public employment were not covered. My immediate besiegement by and problems with hungry job-seekers, who believed "to the victor belongs the spoils", have left me with a lingering repugnance for the involvement of politicians or political parties in appointments, promotions or other preferment in the public service. With this goes a solicitude to keep the Ontario public service removed entirely from any possibility of interference in appointment or promotions by politicians, who are elected to be *legislators*, or by their party associations. It is clear from the Report that this solicitude is shared by all members of the Commission, but my earlier experiences make me perhaps more cynical than other Commissioners about the possible return of undesirable practices.

From the submissions made to the Commission in public hearings on this Reference or from other sources of information, I have been unable to detect any urgent desire on the part of Ontario public servants generally to participate actively in the partisan political process.

My real problem in this Reference has been to try to answer the question: Has the merit system and non-interference by politicians or political parties become so firmly fixed and ingrained in Ontario's public service that it will not be and cannot be disturbed by participation of Crown employees in the partisan political process? Will it be possible for our political governors at any particular time to harm the career and advancement of a known and outspoken opponent of undoubted quality? "A wink being as good as a nod", may it be that a Minister or his senior officials, by a wink or a whisper, may make it equivalent to a command in appointments and promotions? That is my note of caution based upon earlier and wider experience in public service matters than any of my distinguished colleagues.

The reason I have signed this Report is that I have a fundamental faith in the common sense, good faith, discretion and loyalty of Ontario public servants. I do not believe they will abuse the political rights proposed to be extended to them and will not convert Ontario's public service into "political machines" or a political circus. Moderation and good taste in the exercise of extended political rights will be, I earnestly hope, the governing factors. I am comforted by the fact that in almost all jurisdictions, where political participation has been opened up to public service employees, they have responded by performing with circumspection.

For these reasons and doubts, my explicit recommendation is that, after the next federal and provincial elections and, in any event, within five years of implementation of any legislation based upon this Report, the then members of the Ontario Law Reform Commission — or other independent tribunal — should be instructed to review the operation of such legislation and assure that the relaxations proposed in this Report have not led to a deterioration in the quality of Ontario's public service, nor the public perception of it, nor to the growth of publicly financed political "machines".*

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* After considering the proposal of the Hon. R.A. Bell for a review of any legislation implementing the Commission's recommendations, the other Commissioners concurred in the proposal and recommended that such a review should take place.

SUMMARY OF RECOMMENDATIONS

The Commission makes the following recommendations:

GENERAL RECOMMENDATIONS FOR REFORM

1. (1) For employees covered by the *Crown Employees Collective Bargaining Act* there should be a statutory right of arbitration before the Grievance Settlement Board concerning issues relating to political activity, critical comment, and disclosure of government information.

   (2) The proposed right of arbitration should not depend upon the provisions of any collective agreement, but should be an independent right much like the current right to arbitration in respect of discipline, classification, and evaluation grievances.

   (3) A parallel statutory right of arbitration before the Public Service Grievance Board should be available to Crown employees who are not covered by the *Crown Employees Collective Bargaining Act*.

   (4) All Crown employees to be affected by our recommendations should have access to the Grievance Settlement Board or the Public Service Grievance Board, as the case may be, in order to determine any issues relating to the interpretation of the proposed rules. This right of access should be available whether or not disciplinary proceedings are involved. In addition, all Crown employees who are entitled at present to bring a grievance in relation to a dismissal should be entitled to grieve any disciplinary action arising from the application of the proposed rules.

2. (1) As part of the process of amending the law, a careful study should be made of all Crown agencies, with a view to identifying those agencies that serve the Crown in capacities so dissimilar to the public service itself as to justify the exclusion of their employees from some or all of the rules to be proposed in relation to political activity, critical comment, and disclosure of information.

   (2) The rules proposed should apply to all persons now included within the definition of "Crown employee" under the *Public Service Act*, as well as employees of Ontario Hydro and the Ontario Northland Transportation Commission, except for employees of those agencies, including the agencies mentioned above, identified for exclusion pursuant to the review recommended in paragraph (1), and except for members of the Ontario Provincial Police (see Recommendation 9).

3. (1) An Office of Special Counsel should be created.

   (2) Solicitor-client privilege should apply to all communications between the Special Counsel and Crown employees.

(3) The Special Counsel should be appointed by the Lieutenant Governor in Council on the address of the Legislative Assembly so that the Special Counsel would be an officer of the Legislature, reporting to, and funded by, the Legislature much as the Office of the Ombudsman now is.

4. The integrity of the merit system should be preserved, and the necessary measures taken, to guarantee that appointments, promotions, and evaluations take place under guidelines that ensure that only proper considerations will be taken into account, and that political allegiances will be grounds neither for preference nor for discrimination.

RULES REGARDING POLITICAL ACTIVITY AND CRITICAL COMMENT

CATEGORIZATION OF CROWN EMPLOYEES FOR THE PURPOSE OF RESTRICTIONS ON POLITICAL ACTIVITY AND CRITICAL COMMENT

5. For the purpose of restricting political activity and critical comment, the public service should be divided into the following two categories:

   (a) a politically restricted category, comprising those employees who satisfy the specified criteria (see Recommendation 6); and

   (b) a category comprising all other Crown employees, the members of which are free to engage in political activity and critical comment, subject to certain restrictions relating to candidature and certain standards of conduct (see Recommendations 14, 17, and 21 *et seq.*).

6. The restricted category should be composed of the following:

   (a) persons employed in line management positions in the public service, from the deputy head of a ministry or chief executive officer of an agency, to the level of a branch director in a ministry, or the equivalent position carrying similar responsibility in an agency;

   (b) persons directly involved in the administration of justice in such a way as to affect individual citizens in their liberty or property, including:

      (i) Provincial Court Judges;

      (ii) All members of the legal profession employed in a professional capacity and engaged in representing the Crown before the courts, agencies, boards, and commissions; and lay persons performing similar functions before agencies, boards, and commissions;

      (iii) Registrars of the Provincial Courts, District Courts, and all levels of the Supreme Court, including Local Registrars;

- (iv) Sheriffs, and Bailiffs of the Provincial Court (Civil Division);
- (v) Justices of the Peace;
- (vi) Masters of the Supreme Court; and
- (vii) Chairmen, Vice Chairmen, Registrars, and members of all permanent agencies, boards, and commissions exercising adjudicative functions, except members who are expressly appointed to be representative of a particular interest where such members cannot exercise the tribunal's jurisdiction alone;

(c) Crown employees who are directly involved in the formulation of objectives and policy in relation to the development and administration of programmes of the government or an agency of the Crown, or in the formulation of budgets of the government or an agency of the Crown;

(d) persons employed in a position confidential to the Lieutenant Governor, the Executive Council, a minister of the Crown, a judge of a Provincial or District Court or of the Supreme Court, the deputy head of a ministry or the chief executive officer of any agency of the Crown, and any adjudicative board, agency or commission in relation to its adjudicative functions; and

(e) Crown employees whose primary job function is to act in a public representative capacity as official spokespersons in the interests of the Crown or of an agency of the Crown.

7. Where membership in the restricted category is determined by means of the exercise of judgment involving the application of specified criteria, that judgment should be exercised initially by the public service itself, at the instance of the deputy head or chief executive officer.

8. (1) No employee should be considered to be in the restricted category until he or she has been notified in writing of membership in that category by the person authorized to make such designations.

(2) An individual designated as being a member of the restricted category should have a right of appeal to one of the public service appeal boards already established for the purpose of dealing with other employment rights and obligations (see Recommendation 1).

(3) The decision of the public service appeal board should be final and binding on both the Crown and the individual Crown employee, subject only to the usual judicial review procedures.

(4) All postings and advertisements of jobs in the restricted category should carry a notice to the effect that the position falls within the restricted category and that the position will involve certain restrictions on political activity and critical comment.

9. Members of the Ontario Provincial Police now covered by Schedule 2 of

the regulations passed under the *Public Service Act* should be transferred, by statutory amendment, to coverage under the regulations passed under the *Police Act*. It may be that further consideration should be given to the appropriateness of political restrictions on the police, but such consideration is beyond the scope of this Reference.

10. Notwithstanding the criteria for inclusion in the restricted category (see Recommendation 6), the restricted category should not include the members of a minister's political staff.

POLITICAL RESTRICTIONS APPLICABLE TO THE RESTRICTED CATEGORY

11. (1) Members of the restricted category should be permitted to engage in municipal political activity, subject to the following:

    (a) the restrictions now set out in section 11 of the *Public Service Act*, that is:

        (i) the candidacy, service or activity should not interfere with the performance of the employee's duties as a Crown employee;

        (ii) the candidacy, service or activity should not conflict with the interests of the Crown; and

        (iii) the candidacy, service or activity should not be in affiliation with or sponsored by a provincial or federal political party; and

    (b) obtaining prior permission from an authority designated for that purpose.

    (2) Where permission is refused, the authority should be required to give reasons for such refusal.

    (3) The refusal should be appealable to the appropriate appeal board (see Recommendation 1), whose decision should be final and binding, subject to the usual judicial review procedures.

12. The prohibitions proposed in Recommendation 13 should apply to political activity at both the federal and provincial level.

13. Crown employees in the restricted category should be prohibited from engaging in the following political activities:

    (a) candidature in a provincial or federal election or serving as an elected representative in the legislature of any province or in the Parliament of Canada, unless the employee first resigns from Crown employment;

    (b) soliciting funds for a federal or provincial political party or candidate;

    (c) associating his or her position in the service of the Crown with any political activity; and

(d) canvassing on behalf of or otherwise actively working in support of a provincial or federal political party or candidate during an election or at any other time.

CANDIDACY IN A FEDERAL OR PROVINCIAL ELECTION BY CROWN EMPLOYEES NOT IN THE RESTRICTED CATEGORY

14. (1) Crown employees not in the restricted category who wish to accept a nomination for a federal or provincial political office and run for that office should be required to take a leave of absence.

(2) The leave of absence should be without pay, but there should be no loss of seniority or service credits.

(3) Candidates nominated after the issuance of the election writ should be required to commence the leave of absence upon nomination.

(4) Candidates nominated prior to the issuance of the election writ should have the option of commencing the leave of absence as soon as they are nominated, but they should be required to commence the leave of absence as soon as the writs are issued.

(5) The leave of absence should extend, at the employee's option, for a short period after election day, and a defeated candidate should be granted an extension sufficient to permit a recount or other appeal procedures to be carried out if necessary.

(6) Where an employee is not elected, the employee should be entitled to return to work and should be treated for all purposes as if he or she had been employed in the public service for the full period of the leave of absence, except for the loss of pay during that period.

(7) The present statutory provisions for resignation and reinstatement in employment of an employee elected to a federal or provincial office, should be retained. However, an employee returning to a position in the service of the Crown should be entitled to count the period of time served in an elective office towards seniority and service credits in the public service.

POLITICAL RESTRICTIONS APPLICABLE TO ALL CROWN EMPLOYEES

15. It should be provided by statute that no Crown employee shall be in any manner compelled to take part in any political undertaking, or to make any contribution to any political party, or be in any manner threatened or discriminated against for refusing to take part in any political undertaking or for refusing to make any contribution.

16. A code of conduct, governing the conduct of all Crown employees in relation to political activity, should be enacted by statute.

17. The code of conduct should contain the following general restrictions on the political activity of Crown employees:

(a) a Crown employee, other than a Crown employee on a candidacy leave of absence, should not undertake any political activity during his or her working hours;

(b) a Crown employee, other than a Crown employee on a candidacy leave of absence, should not undertake any political activity at his or her place of employment;

(c) a Crown employee should not undertake any political activity that in any way amounts to coercion or gives rise to a reasonable apprehension of coercion by reason of the employee's position in the service of the Crown;

(d) a Crown employee should not undertake any political activity that would take improper advantage of the employee's position in the service of the Crown;

(e) a Crown employee should not engage in any political activity that produces a direct conflict with the interests of the Crown in connection with the performance of his or her duties as an employee; and

(f) a Crown employee should not engage in any political activity that gives rise to a reasonable apprehension, on the part of the public, of bias in the making by the employee of any adjudicative, allocative, or evaluative decision in the course of his or her duties as an employee.

18. (1) The Crown should be permitted to notify a Crown employee, in writing, that a particular activity is proscribed under one or more of the general restrictions, and that disciplinary action will follow if the employee engages in that activity.

(2) The Crown's notice, and any disciplinary action taken, should be subject to the grievance and appeal procedures available to the employee or class of employees affected.

(3) The fact that an activity is undertaken contrary to express notice should be relevant to the question of penalty.

19. (1) Because of the necessity to make the penalty fit the offence, and to take into account all the circumstances of each case, section 16 of the *Public Service Act*, which effectively deems all breaches of the restrictions on political activity to be just cause for dismissal, should be repealed.

(2) The appeal boards should have jurisdiction to impose a penalty commensurate with the gravity of the offence.

20. (1) Crown employees should be able to seek the advice of the Special Counsel concerning whether or not a certain course of action will be likely to offend the law.

(2) At the employee's option, in respect of subsequent disciplinary action, the Special Counsel's advice should be admissible as a fact before the tribunal, as evidence that the employee acted in good

faith, to be considered by the tribunal to whatever extent it is found to be relevant to the proceeding before it.

CRITICAL COMMENT BY CROWN EMPLOYEES

21. (1) The restrictions on critical comment should apply to critical comment in the literal sense of the words, importing either approbation or reprobation.

(2) The restrictions on critical comment by Crown employees should only apply to comment that is public in the sense that, whether oral or written, it is disseminated in such a way as to make it clear that the views expressed are those of the speaker in circumstances where the speaker is known to be a Crown employee. Therefore, private or anonymous expressions of opinion should not be restricted; it is only where the expressions of opinion have a direct and public impact on the speaker's employment in the service of the Crown that the restrictions should become operative.

22. A Crown employee in the restricted category should not engage in critical comment on government policy or government action that identifies the Crown employee or the comment with a political party.

23. A Crown employee should not engage in critical comment on government policy or government action where such comment creates a direct conflict with the interests of the Crown in connection with the performance of the employee's duties.

24. A Crown employee whose duties include adjudicative, allocative or evaluative decision-making should not engage in critical comment on government policy or government action where such comment creates a reasonable apprehension of bias in the performance of the employee's duties in relation to such decision-making.

25. A Crown employee should not engage in critical comment on government policy or government action, or express such critical comment in such a way, so as to create a reasonable apprehension that working relationships within the public service involving the employee, or the employee's ability to perform his duties effectively, will be significantly impaired.

26. A Crown employee should not engage in critical comment on government policy or government action that involves the employee's own ministry or agency, except where the policy or action directly affects the employee in his or her personal capacity.

27. The restrictions on critical comment should apply only to critical comment by Crown employees in their private capacities, and not to employees carrying out their duties as Crown employees.

28. The restrictions on critical comment should be subject to an express exception for the participation by Crown employees in the lawful activities of a bargaining agent or employee association.

29. The procedural approach for the restrictions on critical comment should be the same as those for the restrictions on political activity.

30. (1) Crown employees should be able to seek advice, in confidence, from the Special Counsel in relation to any proposed exercise of critical comment about which the employee is unsure.

    (2) At the employee's option, in respect of subsequent disciplinary action, the Special Counsel's advice should be admissible as a fact before the tribunal, as evidence that the employee acted in good faith, to be considered by the tribunal to whatever extent it is found to be relevant to the proceeding before it.

DISCLOSURE OF GOVERNMENT INFORMATION

GENERAL DISCLOSURE RULES

31. A new statutory regime should be adopted respecting the duty of confidentiality owed by Crown employees. This regime should make as explicit as possible the nature and scope of a Crown employee's rights and obligations concerning the disclosure of government information that comes to the employee's knowledge or possession by virtue of his or her employment (see Recommendation 33).

32. The oath of secrecy, administered pursuant to section 10(1) of the *Public Service Act*, should be abolished.

33. Subject to the proposals that follow, the law relating to the disclosure of government information by Crown employees should be governed by the regime established under the proposed *Freedom of Information and Protection of Individual Privacy Act, 1986*. That is to say, the right to determine matters relating to disclosure, including the right to delegate such authority, should reside in the proper government agency "head", as envisaged in the proposed Act.

34. Under the regime proposed in Recommendation 33, the common law duties of loyalty, good faith, and confidentiality, including the common law defences to actions brought for breach of these duties, should continue to apply, at least insofar as the common law is not in conflict with the proposed new statutory disclosure provisions. In other words, compliance with the proposed scheme should not necessarily be a defence to an action for breach of the common law duties. (See, also, Recommendation 38.)

35. With respect to the law governing the disclosure of government information by Crown employees, there should be no distinction between information in a "record", as defined in the proposed *Freedom of Information and Protection of Individual Privacy Act, 1986*, and information not in a record, or between information that has been specifically requested by a member of the public and information that an employee wishes to divulge on his or her own initiative, without any request.

36. No exception to the proposed general disclosure rules should be made where an employee discloses, in the course of making a public or private comment, government information that has not been properly authorized for release to the public under those rules (see Recommendation 33).

WHISTLEBLOWING

37. As an exception to the general rules governing the disclosure of government information, employees who disclose information allegedly evidencing serious government wrongdoing should be protected from disciplinary or other action, in the manner recommended below, where such disclosure is in the public interest.

38. Where a Crown employee wishes to disclose information allegedly evidencing serious government wrongdoing, he or she should be entitled to rely on the Special Counsel procedure recommended below (see Recommendations 40 *et seq.*) or to rely on the common law defence to any subsequent proceeding brought against the employee in respect of such disclosure.

39. The recommendations respecting whistleblowing should apply equally to all categories of Crown employees.

40. (1) In addition to the formal procedure recommended below, the proposed Special Counsel (see Recommendation 3) should have a purely advisory role. In particular, a Crown employee should be entitled to seek the advice and guidance of the Special Counsel where the employee has information that he or she believes evidences government wrongdoing.

    (2) The Special Counsel should be under a duty to advise the employee concerning such matters as the options available to him or her should the employee wish to pursue the issue further.

41. A Crown employee should be protected from any disciplinary action where he or she discloses to the Special Counsel government information that the employee reasonably believes evidences (1) a violation of a statute, regulation, or rule; (2) mismanagement, waste of funds, or abuse of authority; (3) danger to health or safety; or (4) other wrongdoing of a similar nature, by government or any agency, branch, division, or employee thereof, in the course of performing any public function or exercising any power conferred by law, that ought, in the public interest, to be disclosed.

42. The Special Counsel should not be entitled to initiate further proceedings, as proposed below, unless the Special Counsel reasonably believes that the information disclosed by the employee evidences government wrongdoing that ought, in the public interest, to be disclosed, having regard to the types of conduct described in Recommendation 41.

43. (1) Subject to paragraphs (2) and (3), where the Special Counsel reasonably believes that the employee's information does, in fact,

evidence government wrongdoing that ought, in the public interest, to be disclosed, as a general principle the Special Counsel should be under a duty to require the head of the appropriate agency to investigate the employee's allegation and, within thirty days, submit to the Special Counsel a report describing, *inter alia*, the conduct of the investigation, whether any wrongdoing was discovered, and what the head has done or intends to do as a result of the investigation.

(2) Where the Special Counsel reasonably believes that it would not be desirable to require the head of the appropriate agency to investigate the employee's allegation and report back to him or her, because, in the Special Counsel's view, a proper investigation and report would not take place or would not result in a proper resolution of the issue, the Special Counsel should be empowered to disclose the relevant information to whatever person or body the Special Counsel thinks appropriate.

(3) Where the Special Counsel believes that the proposed thirty day period is too long, because, for example, the employee's allegation involves what the Special Counsel considers to be a matter of urgency, the Special Counsel should be empowered to require the head to investigate and report, either orally or in writing, at the earliest reasonable opportunity.

44. (1) (a) The Special Counsel should be required to maintain a special file containing the information disclosed to him or her by the whistleblowing employee and any report submitted by the agency head.

(b) Subject to the exceptions proposed in paragraph (2), the file should be open to the public after the Special Counsel receives the agency head's report or after the expiry of the period during which the report must be filed (see Recommendation 43).

(c) In no case should the file that is open to the public contain the name or any other identifying feature of the whistleblowing employee that would jeopardize his or her anonymity.

(2) (a) After receipt of the agency report or after the expiry of the period during which the report must be filed, the Special Counsel should be entitled to refuse to grant public access to the file where he or she reasonably believes that the employee's information and any agency report do not, in fact, evidence government wrongdoing that ought, in the public interest, to be disclosed.

(b) In making this determination concerning the public interest, the Special Counsel should be required to have regard to all the circumstances of the case, including whether the employee's anonymity would be jeopardized by disclosure.

(c) Where the Special Counsel has forwarded the employee's information to a person or body other than the agency head (see

Recommendation 43(2)), the Special Counsel should be empowered either to refuse to make any information available to the public in the Special Counsel's file, or to delay such publication, where he or she reasonably believes that disclosure would prejudicially affect any criminal or other investigation undertaken by the police or other body to whom the employee's information has been sent.

45. Where the Special Counsel reasonably believes that the information disclosed by the employee or the agency head is of immediate and significant interest to the public, the Special Counsel should be entitled to disclose the information to any person or body, as he or she deems appropriate in all the circumstances.

46. (1) In the context of whistleblowing, a separate set of rules should be enacted to govern the disclosure of government information that is confidential under the disclosure rules proposed in Recommendation 33.

(2) With respect to information disclosed to the Special Counsel by an employee (see Recommendation 41), where the appropriate agency head has been notified of the employee's allegation by the Special Counsel, the head should be under a duty to inform the Special Counsel, forthwith and in writing, of any determination that he or she makes that such information is confidential and should not be disclosed to the public.

(3) Where the head has made the determination referred to in paragraph (2), neither the Special Counsel nor the employee should be entitled to disclose further the confidential information. However, the employee should be entitled to require the Special Counsel to apply to the court for an order that the information, originally disclosed to the Special Counsel, should be disclosed to the public (see Recommendations 47 *et seq.*).

(4) Where, upon a request by the Special Counsel to report, the head properly determines that the agency has relevant information that is confidential and ought not to be disclosed to the Special Counsel, the head should have the right to

(a) refuse to include this information in his or her report to the Special Counsel;

(b) disclose the confidential information to the Special Counsel and to the employee, with the further right to preclude any subsequent disclosure of the information by the Special Counsel or the employee; or

(c) disclose the information to the Special Counsel and direct that there should be no further release to any other person.

(5) In the situations envisaged by paragraph (4), the employee should be entitled to require the Special Counsel to apply to the court for an

order that the information should be disclosed to the public (see Recommendations 47 *et seq.*).

47. Applications by the Special Counsel for an order that confidential information be disclosed to the public should be heard by the Supreme Court of Ontario. However, should the role and powers of the Information and Privacy Commissioner, to be appointed under the proposed *Freedom of Information and Protection of Individual Privacy Act, 1986*, be altered, so that the Commissioner is given jurisdiction to exercise wider discretionary powers and to order the disclosure of information in the "public interest", consideration should be given to empowering that official to hear applications by the Special Counsel.

48. An appeal from the court's decision respecting the disclosure of confidential information to the public should lie to the Divisional Court. A further right of appeal to the Court of Appeal should be granted in any case that raises a question of public importance.

49. The costs of applications and appeals by the Special Counsel should be borne by the Province of Ontario.

50. No disciplinary action should be permitted to be taken in respect of anything done pursuant to a court order.

51. Where the Special Counsel has brought an application to the court for an order for disclosure, the court should be empowered

    (a) to order the Special Counsel to disclose the information in the appropriate manner where it considers that the public interest in disclosure outweighs the governmental interest in keeping the information confidential;

    (b) to examine or hear the information, *in camera* or otherwise, to order disclosure of all or part of the information, and to impose any restrictions or conditions that it thinks appropriate in the public interest; and

    (c) to order that the employee testify as a witness where the court is satisfied that the need for such testimony outweighs the employee's need to preserve his or her anonymity.

52. Once the Special Counsel has applied to the court,

    (a) the Special Counsel should not be granted any discretionary powers in respect of the disclosure or non-disclosure of the information in question, unless expressly ordered by the court; and

    (b) the Special Counsel should not be empowered to discontinue or withdraw the application, whether on the employee's instructions or on his or her own initiative.

SANCTIONS

53. If necessary, Parliament should amend any relevant federal legislation in

order to ensure that the disclosure of provincial government information that, under the Commission's proposals, would be lawful, either under provincial legislation or at common law, is not subject to criminal sanctions.

54. Bearing in mind the proposals made by the McDonald Commission, in Canada, and the Franks Committee, in the United Kingdom, concerning the breadth of the applicable *Official Secrets Act*, the federal government should study the disclosure regime proposed by the Commission in order to determine what criminal sanctions, if any, ought to be imposed for the disclosure of provincial government information that, under the Commission's proposals, would be unlawful, either under provincial law or at common law.

FURTHER REVIEW

55. After the next federal and provincial elections and, in any event, within five years of implementation of any legislation based upon the proceeding recommendations, the Ontario Law Reform Commission, or another independent tribunal, should be instructed to review the operation of such legislation in order to be assured that the relaxations reflected in the legislation have not led to a deterioration in the quality of Ontario's public service, or the public perception of it, nor to the growth of publicly financed political "machines".*

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* See the Memorandum of Reservations by the Hon. Richard A. Bell, *supra*, 357, at 358.

CONCLUSION AND ACKNOWLEDGMENTS

1. CONCLUSION

The Commission's Reference has involved an examination of the public policy issues relating to political activity, critical comment, and disclosure of information by Crown employees in Ontario. Our study of these difficult and controversial issues has taken us into the realms of public administration, public sector organization, freedom of information, constitutional law, and other important areas of concern to a large and growing segment of the population.

In the course of this Reference, the Commission has been animated by a desire to accommodate two facets of the public interest, namely, the public interest in a neutral and effective public service and the public interest in fostering and maintaining the individual rights of those employees who staff the service. We are firmly of the view that the institutional neutrality and efficiency of the public service, the impartiality and loyalty of individual Crown employees, and the political and other rights of those employees must all be nurtured and protected if the basic political, social, and constitutional health of our society is to be preserved. Our recommendations represent an attempt to achieve this objective.

2. ACKNOWLEDGMENTS

As we have indicated, upon receiving the Letter of Reference from the Attorney General, the Commission retained the services of Kenneth P. Swan, Esq., of the Ontario Bar, as Project Consultant. In this we were indeed fortunate, for he has expertly guided the Commission in its delicate and difficult task with patience and good humour. For his invaluable contribution to our Report, we express our sincere thanks and gratitude.

We also wish to record our thanks to Kenneth Kernaghan, Esq., Professor of Public Administration and Politics, Brock University, for his research paper on the doctrine of political neutrality in the public service, to the many persons and bodies who, at our Public Hearings or in writing, responded to our advertisement for submissions, and to the various public service commissions throughout the country. These persons and bodies, as well as others throughout Canada and elsewhere with whom we consulted, contributed in no small measure to our understanding and resolution of the issues raised in the Reference.

Finally, we wish to express our gratitude to the Commission's legal staff for their scholarship and dedication in the preparation and writing of this Report. They were, as always, ably assisted by the Commission's administrative and secretarial staff.

All of which is respectfully submitted.

James R. Breithaupt
Chairman

Allan Leal

H. Allan Leal
Vice Chairman

Richard A. Bell
Commissioner

William R. Poole
Commissioner

Earl A. Cherniak
Commissioner

J. Robert S. Prichard
Commissioner

Note: Mrs. Margaret Ross attended the meetings of the Commission at which this Reference was discussed and the recommendations considered. However, since the law firm in which she is a partner represented the Ontario Public Service Employees Union during our Public Hearings and in several matters now before the courts, Mrs. Ross did not vote on any of the recommendations and accordingly did not sign the Report.

June 27, 1986

APPENDIX 1

A. PUBLIC HEARINGS

The following individuals and organizations made oral presentations, and in some cases written submissions, to the Commission at Public Hearings:

TORONTO

Civil Service Commission
    Mr. J. R. Scott, Assistant Deputy Minister
    Staff Relations and Compensation Division

Ontario Public Service Employees Union
    Mr. James Clancy, President

Mr. Bob MacKenzie, M.P.P.

National Union of Provincial Government Employees
    Mr. John Fryer, National President

Ontario Liquor Board Employees Union
    Mr. John Miles, President

Mr. Ed Philip, M.P.P.

Professor O. P. Dwivedi,
    Professor and Chairman, Department of Political Studies
    College of Social Science, University of Guelph

Mr. Bruce McKay

Public Service Alliance of Canada
    Mr. Daryl T. Bean, National President

NORTH BAY

Mr. Floyd Laughren, M.P.P.

Nipissing Area Council of the Ontario Public Service
Employees Union
    Mr. Will Presley, Chairman

Local 633 of the Ontario Public Service Employees Union
    Mr. Jim Hall

Local 636 of the Ontario Public Service Employees Union
Ms. Heather Murray

Local 655 of the Ontario Public Service Employees Union
Mr. Bill Kuehnbaum

OTTAWA

Mr. Michael Cassidy, M.P.

Mr. Albert Roy

Ontario Public Service Employees Union, Region 4,
Eastern Ontario
Mr. Joseph Bénard, Vice-President

Ms. Maude Barlow

B. WRITTEN SUBMISSIONS

In addition, the Commission received written submissions from the following individuals and organizations:

Mr. D. A. Bingham

Mr. Richard H. Boehnke

Civil Liberties Association, National Capital Region
Mr. D. Whiteside, President

Mr. Martin Jaeger

Local 593 of the Ontario Public Service Employees Union
Mr. Graham Murray, President

Local 732 of the Ontario Public Service Employees Union
Mr. Richard Staples and Mr. Thomas Joseph

Mr. Fred Neumann

North Bay & District Labour Council
Mr. Dean Barner, Treasurer

Mr. R. O'Dell

Mr. Bernard J. Pelot

Police Association of Ontario
Mr. Mal Connolly, Administrator

Dr. A. K. Ray, D.Sc.

APPENDIX 2

Public Service Act,
R.S.O. 1980, c. 418

11. A Crown employee, other than a deputy minister or any other Crown employee in a position or classification designated in the regulations, may be a candidate for election to any elective municipal office, including a member or trustee of an elementary or secondary school board or a trustee of an improvement district, or may serve in such office or actively work in support of a candidate for such office if,

(a) the candidacy, service or activity does not interfere with the performance of his duties as a Crown employee;

(b) the candidacy, service or activity does not conflict with the interests of the Crown; and

(c) the candidacy, service or activity is not in affiliation with or sponsored by a provincial or federal political party.

12.-(1) Except during a leave of absence granted under subsection (2), a Crown employee shall not,

(a) be a candidate in a provincial or federal election or serve as an elected representative in the legislature of any province or in the Parliament of Canada;

(b) solicit funds for a provincial or federal political party or candidate; or

(c) associate his position in the service of the Crown with any political activity.

(2) Any Crown employee, other than a deputy minister or any other Crown employee in a position or classification designated in the regulations under clause 30(1)(u), who proposes to become a candidate in a provincial or federal election shall apply through his minister to the Lieutenant Governor in Council for leave of absence without pay for a period,

(a) not longer than that commencing on the day on which the writ for the election is issued and ending on polling day; and

(b) not shorter than that commencing on the day provided by statute for the nomination of candidates and ending on polling day, and every such application shall be granted.

(3) Where a Crown employee who is a candidate in a provincial or federal election is elected, he shall forthwith resign his position as a Crown employee.

(4) Where a Crown employee who has resigned under subsection (3),

(a) ceases to be an elected political representative within five years of the resignation; and

(b) applies for reappointment to his former position or to another position in the service of the Crown for which he is qualified within three months of ceasing to be an elected political representative,

he shall be reappointed to the position upon its next becoming vacant.

(5) Where a Crown employee has been granted leave of absence under subsection (2) and was not elected, or resigned his position under subsection (3) and was reappointed under subsection (4), the period of the leave of absence or resignation shall not be computed in determining the length of his service for any purpose, and the service before and after such period shall be deemed to be continuous for all purposes.

13.-(1) A civil servant shall not during a provincial or federal election canvass on behalf of a candidate in the election.

(2) Notwithstanding subsection (1), a deputy minister or any other Crown employee in a position or classification designated in the regulations under clause 30(1)(u) shall not at any time canvass on behalf of or otherwise actively work in support of a provincial or federal political party or candidate.

14. Except during a leave of absence granted under subsection 12(2), a civil servant shall not at any time speak in public or express views in writing for distribution to the public on any matter that forms part of the platform of a provincial or federal political party.

15. A Crown employee shall not during working hours engage in any activity for or on behalf of a provincial or federal political party.

16. A contravention of section 11, 12, 13, 14 or 15 shall be deemed to be sufficient cause for dismissal.

APPENDIX 3

Regulation 881, R.R.O. 1980,
under the Public Service Act

Schedule 2

PART I

Interpretation

1. In this Schedule, "Management Compensation Plan" and "Executive Compensation Plan" have the same meanings as in Schedule 1.

PART II

For Each Ministry Including
Agencies, Boards and Commissions
Reporting to The Ministry

Assistant Deputy Minister

Executive Director

Executive Co-ordinator

Executive Secretary

General Manager

Branch Director

Full-time head of agency, board or commission

Full-time vice-chairman of agency, board or commission

Full-time member of agency, board or commission

Positions classified as being within the Executive Compensation Plan

Positions classified as being within the Administrative Module,
Personnel Administration Group 19, 20 or 21

PART III

For Specific Ministries in Addition to Part I

MINISTRY OF THE ATTORNEY GENERAL

Court Administrator

Crown Law Officer 1, 2, 3

Judge, Small Claims Court

Justice Administration Officer 1, 2, 3, 4, 5

Justice of the Peace

Master, Supreme Court of Ontario

Provincial Judge

Provincial Registrar, Assessment Review Court

Regional Registrar, Assessment Review Court

Registrar, board or commission

Registrar, Supreme Court of Ontario

Secretary, Senior

Secretary to Chairman, Assessment Review Court

Secretary to Chairman, board or commission

Secretary to Chief Judge of the County and District Courts

Secretary to Chief Justice of Ontario

Secretary to Chief Justice of the High Court

Secretary to Chief Provincial Judge

Secretary to the Attorney General

Secretary to the Deputy Attorney General

Small Claims Court Bailiff

Positions classified within the Management Compensation Plan at Pay Band 18 and higher in the Financial Administration Group, Program Analysis Group or Systems Services Group of the Administrative Module

Positions classified within the Management Compensation Plan in the Legal Group of the Professional Module

MINISTRY OF COMMUNITY AND SOCIAL SERVICES

Co-ordinator, Intergovernmental Policy

MINISTRY OF CITIZENSHIP AND CULTURE

Co-ordinator, Regional Services

MINISTRY OF EDUCATION

Chief Architect

Positions classified as Education Professional Module 19, 20, 21, 22

MINISTRY OF THE ENVIRONMENT

Positions classified as Administrative Module, Program Analysis Group 17, 18, 19, 20, 21

MINISTRY OF HEALTH

Administrator, Psychiatric Hospital

MINISTRY OF REVENUE

Regional Assessment Commissioner

SECRETARIAT, SOCIAL DEVELOPMENT

Provincial Co-ordinator

Communications Advisor

Executive Officer, Advisory Council

MINISTRY OF THE SOLICITOR GENERAL

(Ontario Provincial Police)

Commissioned Officer 1, 2, 3, 4, 5

Constable

Constable (Probationary)

Corporal

Sergeant

Sergeant Major

Staff Sergeant

O. Reg. 38/84, s. 1.